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(1) Supreme Court, U.S.
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No. 101301 APR 20 2011

IN THE

SUPREME COURT OF THE UNITED STATES

HARRISTON L. BASS, JR., Petitioner
-vs.-
THE STATE OF NEVADA, Respondent

On Petition for Writ of Certiorari
To The Supreme Court of the State of Nevada

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Was Doctor Bass denied his right to effective assistance of counsel upon being forced to trial when his attorney was admittedly unprepared? The Nevada Courts have refused to address or consider his constitutional right to effective assistance of counsel in relevant post-trial motions or on direct appeal.

2. Was the Nevada statutory scheme pursuant to which Dr. Bass was prosecuted and convicted of murder unconstitutionally vague and indefinite?

3. Was Dr. Bass' conviction based upon the introduction and advocacy of false evidence?

(a) The State has not denied that the evidence in question was false; the State is apparently denying a *Brady* violation premised upon the suggestion that Petitioner should have known he was being convicted on false evidence.

(b) The prosecutor committed gross legal and ethical misconduct by introducing false evidence, arguing its truthfulness, and failing to correct its falsehood.

LIST OF PARTIES TO PROCEEDINGS

All parties appear in the caption of the case on the cover page. Nevada Attorney General's Office has represented the State of Nevada at all stages of the criminal proceedings in question (including jury trial and direct appeal).

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STATEMENT OF BASIS OF JURISDICTION

The Order of Affirmance sought to be reviewed was entered on May 18th, 2010 and is included in the Appendix.

Petitioner timely filed a Motion for Rehearing of said Order of Affirmance which was denied September 28th, 2010. Dr. Bass next filed a Petition for En Banc Reconsideration. On November 24th, 2010 the Nevada Supreme Court entered an Order Directing the State to Answer the Petition for En Banc Reconsideration. Said Order directed that the Answer be limited to the issue of "whether the conviction was based upon false evidence". Respondent's Answer was electronically filed on December 9th, 2010. On January 20th, 2011, the Court denied *en banc* reconsideration.

On February 4th, 2011 Dr. Bass submitted a Motion for Rehearing of the Order Denying En Banc Reconsideration which the Nevada Supreme Court Clerk rejected as not authorized. Petitioner then filed a Motion for Leave to File a Response to Respondent's Answer to Petition for En Banc Reconsideration, and, if Granted, for Related Relief. This Motion was denied on February 11th, 2011. The Nevada Supreme Court's Remittitur was dated February 14th, 2011.

For purposes of calculating the 90 days for filing this Petition pursuant to Supreme Court Rule 13 (1) and (3) the date the *en banc* consideration was denied (January 20th, 2011) is applicable Petitioner's subsequent filings or attempts to file may arguably extend that time

frame; however, additional time is not considered necessary.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner's second (vague-statute) and third (false evidence) questions to this Court primarily involve due process considerations pursuant to the V and XIV Amendments of the United States Constitution. Petitioner's first question (unprepared/ineffective counsel) also involves the VI Amendment of the United States Constitution. Article I § 8 of the Nevada Constitution includes the right to counsel and due process.

STATEMENT OF THE CASE

About Petitioner

Dr. Harriston Lee Bass ("Bass" or "Petitioner") is an African/American and was born in Chicago, Illinois July 28th, 1954. He attended and graduated medical school at Howard University in Washington D.C. where he also interned in surgery. He returned to Chicago completing his residence at Mt. Sinai and ran the Emergency Room at St. Anthony. He came to Las Vegas, Nevada in the mid-80s and practiced at Nellis Air Force Base. Dr. Bass remained in Clark County, Nevada and has practiced medicine since that time.

Dr. Bass' board certification was in general surgery. His transition to a sole practitioner with emphasis on house calls afforded him the opportunity to control his own business and schedule and was consistent with his preference to have maximum personal patient contact. In 1999 Dr. Bass incorporated DOCS On Call, Inc. and advertised as a house call doctor.

Dr. Harriston Bass is religious, principled, and conscientious in his lifestyle and medical practice. He

worked hard to support his family (wife and daughter) and to minimize the expense and suffering of his patients. During his lifetime he was never charged, arrested, or convicted of any offense That ended on December 20th, 2006 when he became the test case for a zealous prosecutor pursuant to a novel interpretation of a previously unenforced statutory scheme. Dr Bass' medical license is revoked, his assets are gone, and he has been in custody for three years. He is still confident that justice will prevail!

Relevant Facts and Case Status

Note: The record on appeal before the Nevada Supreme Court was extensive (14 volumes) and while any pertinent portions are readily available, said record has not been specifically cited in Petitioner's factual statements.

On October 6th, 2005 Amanda Burney a recently hired investigator with the Clark County Coroner's Office was called to investigate the body and death scene of one Gina Micali After examining the body, she inspected the surrounding area and located several prescription pill bottles – two for Imitrex and one for hydrocodone. She also found a medical report from Dr. Harriston Bass dated October 4th. She contacted Dr. Bass by phone who confirmed that he had seen Micali on October 4th. Ms. Burney took photographs of the scene including the pill bottles. She counted the pills in the hydrocodone bottle, flushed the pills down the toilet, and then destroyed the bottles. Ms. Burney concluded this was an accidental death and filed her report which included a medication receipt indicating that the destroyed hydrocodone bottle was given Micali on October 4th (one or two days before her death) and was missing 51 pills.

Several days later Micali's mother and brother Joey visited Gina's residence. At that time, Joey located a number of prescription drug bottles in a kitchen cabinet. Since he didn't want to alarm the mother about the presence of drugs, he returned later to remove them and placed them in a safe at his residence. Subsequently, these were turned over to the office of Attorney Edward M. Bernstein who was representing Gina's mother and estate in a personal injury (wrongful death) claim against Dr. Bass and Allscripts, the manufacturer, packager, and distributor of prescription medications (including hydrocodone). Much of the prescription medication Dr. Bass provided his house-call patients was obtained from Allscripts.

March/April, 2006. According to the investigative division of the State Department of Public Safety, the Clark County Coroner's Office contacted them regarding a suicide of Jamie Petchie. Mr. Petchie had been a prior patient of Dr. Bass. The State's primary investigator was Jennifer Reubart.

June 1st, 2006. The investigative division obtained a search warrant for Dr. Bass' residence, vehicle, and other office/storage locations. His patient information, prescription records, receipts, and all his money were seized. The affidavit in support of the search warrant was sealed and not obtained by Dr. Bass until after a Court Order on **January 3, 2008**.

August 15th, 2006. Pursuant to a subpoena, the investigative division obtained eight pill bottles from Attorney Edward M. Bernstein's office. The State subpoenaed only the Allscripts bottles in Attorney Bernstein's possession.

September 26th, 2006. The Nevada Supreme Court reversed and remanded the District Court's Summary Judgment in an insurance case filed by Dr Bass against the Doctors Company. The reversed judge was Jackie Glass who would soon be assigned to his criminal case

October 2nd, 2006. Attorney Bernstein's office filed suit against Dr Bass, Allscripts, and Walgreens alleging responsibility for Gina Micali's death .

December 20th, 2006. Dr Bass was arrested pursuant to a complaint filed in Justice Court, Clark County, Nevada. An Amended Complaint containing 25 counts including the murder of Gina Micali was filed on December 22nd, 2006 A preliminary hearing took place **January 5th, 2007**. The Justice of the Peace took the evidence under advisement.

January 19th, 2007. An indictment was returned containing 38 counts all alleging the sale of controlled substance . . . 17 times to one Alvin Vetter, 16 times to one Gene Papandrea, and 5 times to one Chad Worthen.

January 22nd, 2007. An information was filed pursuant to the JP's bind-over containing 18 counts. The information case no.: 229628 and the indictment case no.: C229660) were consolidated on **April 19th, 2007.**

February 25th, 2008-March 5th, 2008. The jury trial was conducted resulting in verdicts of guilty as to all 56 counts. At the beginning of trial Dr. Bass' counsel requested a continuance and advised the Court that he was unprepared The judge stated he would never be prepared and proceeded.

April 17th, 2008. A meeting was held at Attorney Edward M. Bernstein's office to release the contents of

State's proposed trial exhibit back to Bernstein's office. Attorney R. Paul Sorenson attended in Dr. Bass' behalf and had the meeting reported.

April 22nd, 2008. Dr. Bass was sentenced, and the Judgment of Conviction filed May 6th, 2008. On **June 5th, 2008** Dr. Bass' Notice of Appeal to the Nevada Supreme Court was filed.

September 23rd, 2008. Dr. Bass filed Post-Conviction Motions for a New Trial or Dismissal Based Upon Newly Discovered Evidence before the trial court. These motions were set for hearing October 7th, 2008.

October 7th, 2008. First hearing. Hearing was continued until October 14th, 2008 to allow the State to file an Opposition on the merits. At the second hearing Dr. Bass' Motion(s) were orally denied.

December 6th, 2008. Dr. Bass' counsel received by mail an unfiled copy of the Order from the October 14th hearing. Interestingly the Order was signed by Judge Glass on November 9th, 2008.

December 22nd, 2008. Dr. Bass filed his Notice of Appeal and Case Appeal Statement. This appeal was consolidated with the earlier (June 5th, 2008) appeal.
The dates and relevant orders of the Nevada Supreme Court are set forth in Petitioner's Statement of the Basis for Jurisdiction and included in the Appendix.

Concisely as to the False Evidence

At the **January 5th, 2007** preliminary hearing, a paper bag purportedly containing the items delivered to Attorney Bernstein was shown to Reubart. It was not opened, the contents displayed, or allowed in evidence.. The bag was returned to Reubart. At jury trial, over a year later, it was identified as State's proposed Exhibit 12. The paper bag was not opened at trial, the contents not

identified, and it was not admitted in evidence. After an un-reported bench conference, the effort to introduce it was abandoned. The bag remained in the custody of the court clerk until released back to Attorney Bernstein's office on April 17th, 2008

The April 17th meeting at Bernstein's office was precipitated by his Motion to release to his office the contents of Exhibit 12 for use in furtherance of their civil case. At the hearing of this Motion, the release of this evidence was objected to by Dr. Bass primarily because he didn't know the contents or appreciate their significance Fortunately, Attorney R. Paul Sorenson attended the inventory and release of these items and had the foresight to record the proceedings. This was the first time anyone in Dr. Bass' behalf had actually seen and documented these contents. The prescription numbers were clearly identifiable, and it was established beyond question that each and every prescription bottle provide to Gina Micali by Dr Bass on October 4th was contained in proposed Exhibit 12. Therefore Amanda Burney's testimony that the bottle with 51 missing pills which she destroyed was provided Micali on October 4th, 2005 was false.

REASONS THAT THIS COURT SHOULD GRANT CERTIORARI

Understandably the Court must be selective in Its certiorari review. This case is unique, compelling, and deserving of such consideration. Petitioner was a highly qualified and licensed black medical physician who happened to be the first individual selectively chosen for prosecution under the State of Nevada's vague and confusing statutory scheme . Ultimately Dr. Bass' murder conviction was based entirely upon the introduction and advocacy of false evidence. This result is

repugnant to our country's fundamental concept of justice. The process by which this occurred was a combination of constitutional violations.

That the evidence was false is clear and overwhelming. Said false evidence was material and formed the basis for Dr, Bass' murder conviction. The trial judge adopted the false evidence and instructed the jury consistent therewith. The prosecutor argued its truth throughout trial. The unique and compelling aspect of this case is that, even though everyone knew or now knows that the evidence was false, the Nevada Courts have declined to grant relief. Petitioner is still incarcerated.

The prosecutor has argued that (i) defense counsel knew or should have known the evidence was false, and (ii) that even if he urged the jury to accept the false evidence as true, the court's instruction that counsel's statements are not evidence was curative. Both the trial court and the Nevada Supreme Court appear to have adopted the position that Dr. Bass' trial counsel knew or should have known the evidence was false. Both courts declined to address ineffective assistance of counsel on direct appeal.

This is a case where any review of the record leads to the conclusion that Dr. Bass was convicted of murder based on false evidence. At best, the prosecutor didn't know (which is unlikely) that the evidence was false while he was submitting and arguing it. At worst, the prosecutor intentionally failed to disclose (or camouflaged) exculpatory evidence and knowingly introduced and argued the false evidence.

Petitioner is endeavoring to limit his Questions to this Court to constitutional violations which are final and

no longer subject to further exploration or exhaustion at the State level. However, if Nevada's post-conviction scheme for addressing ineffective assistance of counsel is valid, Petitioner may be forced to go back through the State trial court and then appeal again to the Nevada Supreme Court. There is no reason to subject Dr. Bass to this prolonged endeavor and continued incarceration. Neither the false evidence or the Void-For-Vagueness issues are going to change and there is no reason for further evidentiary hearings.

ARGUMENT

QUESTION 1. Was Dr. Bass denied his right to effective assistance of counsel by being forced to trial when his attorney was admittedly unprepared?

At the commencement of trial the following statements and discourse occurred between Dr. Bass' lead counsel and the Court.

"**Mr. Phillips:** Your Honor here's a – a problem that we have. We-over the weeks-the last couple of weeks we've been trying to put together all of my client's records that – the ones that have been returned, but his computer has been erased, various documents have just been thrown together. We've been trying to put everything in order that they were. It's a tremendous heap of papers that we can't get through and we need that to defend-

The Court: Mr. Phillips-

Mr. Phillips: -my client.

The Court: We're going to trial today. We are not putting off this trial again – we have put all [sic] this trial too long and today's the day we're going to trial.

Mr. Phillips: Then I need to state for the record emphatically that we're not prepared to go forward today.

The Court: There has been a consorted [sic]effort by the defense to avoid having this case go to trial. This case is going to trial today.

Mr. Phillips: And I need to make the record that the defense has not made any [--to my knowledge, any concerted effort to not go to trial. we just want to go to trial properly and prepared.

The Court: Mr. Phillips, you'll never be prepared for this trial at the way this has been going. So you've tried to continue this. You've tried to recuse me. You've caused all kinds of delays. today is the day, and I told you this. This has been pending for a significant period of time and today is the day we're going to trial."

Where trial counsel candidly acknowledges that he is unprepared to proceed, it would seem unnecessary to trace his trial performance within recognized effective - assistance standards. See *Strickland v. Washington*, 446 U.S. 668 (1984) and *Kirksey v. State,* 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996). Even the best attorney can't be effective if he's unprepared. The record does bear out Attorney Phillips' representations that he wasn't ready. As just one example at the commencement of Defendant's case the Court took a recess and noted:

"THE COURT: Okay. It's a few minutes before 10:00. We just started testimony.. Mr. Phillips, I'm going to give you ten minutes to get your documents together. If you don't have your documents together, we're going to go, and whatever way they are, they are. But you're wasting my jury's time and I'm getting very, very frustrated. So you need to have it together when we come back.

Your client made an unsolicited statement. It's my job to make sure in this courtroom that that doesn't happen. So my tone with your client, who's been sitting there all weekend, knows better, had to be admonished and it was going to be in front of the jury. Now get your act together so we can proceed with this trial."

The Court has a responsibility to assure that an accused receives effective assistance of counsel Here the judge made no inquiry as to what additional preparation was necessary or how long it might take.

QUESTION 2. Was the Nevada statutory scheme pursuant to which Dr. Bass was prosecuted and convicted of murder unconstitutionally vague and indefinite?

The Void-For-Vagueness Doctrine is well recognized and established.

See *Graynard v. City of Rockford*, 408 U.S. 104, 108-109 (1972):

"It is a basic principle of due process that an enactment is void for vagueness if it's prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of

arbitrary and discriminatory application." (footnotes omitted).

and *Smith v. Goguen*, 415 U.S. 566, 575 (1974):

"We are without authority to cure that defect. Statutory language of such standard less sweep allows policemen, prosecutors, and juries to pursue their personal predilictions. Legislators may not abdicate their responsibilities for setting the standards of the criminal law." (footnotes omitted).

A leading Nevada case discussing this doctrine is *Eaves v. Board of Clark County Commissioners*, 96 Nev. 921, 620 P.2d 1248 (1980) which involved the review of an ordinance prohibiting the conduct of escort services. In determining that said ordinance violates both the Nevada Constitution (Article I, Section § 8) and the United States Constitution Amendment XIV § 1 the Court held:

"The court has consistently held that ordinances like Ordinance No. 595, which prescribe serious penalties, must be strictly construed. Oueilhe v. Loveil, 93 Nev. 111, 113, 560 P.2d 1348 (1977); In re Laiolo, 83 Nev. 186, 188, 426 P.2d 726 (1967).

An ordinance which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning, and differ as to its application, violates the first essential of due process, i.e. the notion of fair notice or waning. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); Note, the Void-For-Vagueness Doctrine in the

Supreme Court, 109 U.Pa. L Rev 67, 68 (1960); *accord* Smith v Goguen, 415 U.S. 566, 572 (1974); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) An ordinance which fails to give persons of ordinary intelligence fair notice whether their contemplated conduct is permitted or forbidden must be declared to be void for vagueness, and thus to deny due process of law. United States v. Harriss, 347 U.S. 612, 617 (1954)" (page 923)

In *Eaves* the Court discusses a number of the scenarios or problems created by vague statutes including:

"Considered in the light of established constitutional principles, these ambiguities in Ordinance No. 595 allow too much unbridled discretion. The imprecision in the language of the ordinance permits, and is likely to encourage, arbitrary and discriminatory enforcement. *Papachrisou, supra*, at 170, Coates v. Cincinnati, 402 U.S. 611, 614 (1971)" (page 924)

Dr. Bass' murder charge was:

"COUNT I

SECOND DEGREE MURDER

(SALE OF A CONTROLLED SUBSTANCE CAUSING DEATH)

(A Category A Felony—NRS 200.010, 200.030 and 453.333)

That the defendant, HARRISTON L. BASS, JR did unlawfully kill a human being which was proximately caused by a controlled substance sold, given, traded or otherwise made available to another person in violation of Nevada Revised Chapter 453 to wit: That from June 2005 through October, 2005, in Clark County, State oNevada,

the defendant, without having a license to dispense prescription drugs containing a controlled substance, sold, gave or otherwise made available prescription drugs containing Hydrocodone, a schedule III controlled substance, to Gina Micali which caused her death on or about October 6, 2005."

The original criminal complaint alleged "malice aforethought" (I-0002) but this language was dropped.

NRS 200.010 defines murder:
Murder is the unlawful killing of a human being.

1. With malice aforethought, either express or implied.

2. Caused by a controlled substance which was sold, given, traded or otherwise made available to a person in violation of chapter 453 of NRS; or

3. Caused by a violation of NRS 453.3325.

The unlawful killing may be effected by any of the various means by which death may be occasioned."

The murder statute refers to a general violation of Chapter 453, but the State's charging document identifies a specific provision of that Chapter NRS 453.333 which provides in pertinent part:

"If the death of a person is proximately caused by controlled substance which was sold, given, traded or otherwise made available to him by another person in violation of this chapter, the person who sold, gave, or traded or otherwise made this substance available to him is guilty of murder." . . . . ." Emphasis added.

The charging document does not set forth another section of Chapter 523 which Dr. Bass allegedly violated. While this is required pursuant to NRS 173.075 (3), one has to look through the constantly changing Uniform Controlled Substance Act and/or the regulations of the pharmacy board to see if there is one. The provision of the above identified statute which has been highlighted "otherwise made available" would clearly include a doctor prescribing said substance. There wasn't and isn't any question but that Dr. Bass was authorized to prescribe the controlled substances at issue. This creates the interesting and important question. If Dr. Bass made available to Gina Micali the same controlled substance through means not in violation of the Chapter and arguably also by means in violation of the Chapter is he guilty of murder? While it would seem an absurd conclusion, this is a reasonable interpretation of the statute. Admittedly the zealous prosecution tried to work its way around this statutory dilemma with causation arguments; however, this effort not only did not rectify the statutory infirmities but resulted in an improper murder conviction.

The Controlled Substance Act Chapter 453 is divided in a number of sections: General Provisions, Schedules, Regulation, Enforcement, Forfeitures, and Offenses and Penalties.

NRS 453 226 is a regulatory provision:

"1. Every practitioner or other person who dispenses any controlled substance within this state or who proposes to engage in the dispensing of any controlled substance within this state shall obtain biennially a registration issued by the board in accordance with its regulations

2. A person registered by the board in accordance with the provisions of NRS 453.011 to 453.552, inclusive, to dispense or conduct research with controlled substances may possess, dispense or conduct research with those substances to the extent authorized by the registration and in conformity with the other provisions of those sections.

3 . . . . .

4. The board may waive the requirement for registration of certain dispensers if it finds it consistent with the public health and safety.

5. A separate registration is required at each principal place of business or professional practice where the applicant dispenses controlled substances.

6. The board may inspect the establishment of a registrant or applicant for registration in accordance with the board's regulations."

Practitioner is defined in NRS 453.126 in pertinent part:

"Practitioner" means:

1. A physician, dentist, veterinarian or podiatric physician who holds a license to practice his profession in this state and is registered pursuant to this chapter." . . . .

The murder charges against Dr. Bass specify two statutes (NRS 453.333 and NRS 200.010) neither of which

define a completed crime This is true since both require a violation of some unidentified provision of Chapter 453.

There are two statutes which might apply:

NRS 453.321 which is included in the Offenses and Penalties section:

"1. Except as authorized by the provisions of NRS 453.011 to 453 552, inclusive, it is unlawful for a person to:
(a) Import, transport, sell, exchange, barter, supply, prescribe, dispense, give away or administer a controlled or counterfeit substance; or
(b) Manufacture or compound a counterfeit substance;
(c) Offer or attempt to do any act set forth in paragraph (a) or (b).

. . . . . .

4. Unless a greater penalty is provided in NRS 453.333 or 453.334, if a person violates subsection 1, and the controlled substance is classified in schedule III, IV, or V, he shall be punished·
(a) For the first offense, for a category C felony as provided in NRS 193.130

. . . . . .

and

NRS 453 232. **Penalty for failure to register.** which is included in the Regulatory section:

A person who dispenses a controlled substance without being registered by the board if required by NRS 453.231 is guilty of a category D felony and shall be punished as provided in NRS 193 130.

. . . . .

Considering the fact that the other 55 counts against Dr. Bass are brought pursuant to NRS 453 232 which is consistent with the Court's instructions, and he was sentenced to a Category C felony, it is clear that the

State selectively picked that statute. However, said statute referring to "any person" does not apply to a licensed medical doctor authorized to prescribe but able to dispense only with the prior authorization of the board. The only "person(s)" that fall into that category are a limited number of people (most specifically physicians). All others are not allowed to apply for registration to dispense. Dr. Bass was therefore charged, convicted, and sentenced under the wrong statute. Whether we mark this up as prosecutorial over-zealousness, judicial errors in rulings and instructions, ineffective assistance of his counsel, or whatever; we still have invalid convictions. While Dr. Bass is presenting this issue within the context of the overall statutory infirmities, even if they didn't exist (or are found not to), he still can't be convicted of a crime (murder) he couldn't commit.

QUESTION 3. Was Dr. Bass' conviction based upon the introduction and advocacy of false evidence?

There is no evidence in the record refuting the Declaration of R. Paul Sorenson, Esq. asserting his belief that he was the first person to inspect the contents of proposed Exhibit 12 in Dr. Bass' behalf . This didn't occur in any prior proceedings; and, Dr. Bass' trial counsel made it clear in his Opening Statement that he hadn't:

"She was prescribed medication. She filled those prescriptions as counsel stated, but nobody ever found them. We don't know where those pills are. We don't know what she was doing with the pills. We don't know if she left them at her mom's house, if she left them at work, if she left them with a friend, if she left them in her car. We don't know that."

What was discovered on April 17th, 2008 was that proposed Exhibit 12 contained hydrocodone bottles bearing prescription numbers BG686647, BG686648, and BG686642.

Dr. Bass' patient record for Gina Micali on October 4th, 2005 establishes that the prescription labels in the right hand side which though difficult to read are:

Hydrocodone, 325 MG/10MG, 100 tablets, Prescription No · BG686647

Hydrocodone, 100 tablets, Prescription No.: BG686642

Hydrocodone, 100 tablets, Prescription No.: BG686648

The Evidence Was Material and Exculpatory

To put the significance of this newly discovered evidence in perspective, the prosecution's entire theory was that the hydrocodone which caused Gina Micali's death was dispensed by Dr. Bass two days earlier. This is clear from the prosecutor's Opening Statement:

"The Clark County Coroner's Office also sent an investigator, Amanda Burney. She walked into the home, and through protocol – there's established protocol – photographed the home checked the body, confirmed that Gina, had died and discovered in the kitchen an All Scripts bottle containing prescription pills. She'll tell you that based on her investigation, she **confirmed** that All Scripts bottle **came from the defendant two days earlier**. (emphasis provided)

and closing:

"And why do you have to consider it? Because look at the proximate cause instruction **Proximate is that cause which is natural** in continuous sequence

unbroken by any other intervening causes that produces the injury and without which the injury would not have occurred. She would not have died if she hadn't take the hydrocodone that was **sold to her by Dr. Bass on October 4, 2005**. And he sold her three bottles. **And you've seen the picture from the coroner investigating that documented a bottle of All Scripts. Can't you draw a reasonable inference that she had taken All Script pills?**

In addition to that, you heard her brother testify that a couple weeks after the funeral he went in and found another three All Script bottles in her hutch in the kitchen, in the drawer. 261 nanograms of Hydrocodone in her system on the 7th. Dr. Bass selling her three bottles on the 5th day of October, Joey Micali going into the house three days after the funeral finding three bottles of All Scripts. She died because of the drugs that he sold her and **that's what I have to show.** And you can infer that circumstantially. **And if you don't apply that rule of law, then you are ignoring the instructions.** And you've seen the picture from the coroner investigator that documented a bottle of All Scripts. **Can't you draw a reasonable inference that she had taken All Script pills?"** (Vol. 7, pp. 78-79, emphasis provided).

As the prosecutor told the jury, he would and did elicit from Amanda Burney a confirmation that the half-filled hydrocodone bottle which she had destroyed was given to Micali by Dr. Bass two days earlier. After showing Ms. Burney State's Exhibit 16 (the coroner's office medication receipt) we had the following questions and answers:

BY MR. HAFEN:

Q. Looking at page 2 of the exhibit, what information does that contain?

A It is a description of the meds that were found at the scene and the quantity that were prescribed and the name of the doctors that prescribed it as well as the dates.

Q And does this log reflect, then, the same drug bottle that's depicted in that picture that I showed you previously?

A. Yes, because the information on the log is always taken from the prescription bottle.

Q. And according to that log on page 2, then, where did you find the bottle?

A. Again, the hydrocodone bottle was found in the kitchen. (VI – 1323-1324) (Emphasis added)

The evidence conclusively establishes that the half-full hydrocodone bottle was not given, dispensed, sold, or provided to Gina Micali two days before her death. This destroys the prosecution's case, and refutes its arguments to the jury. It further renders the jury's verdict inconsistent with the instructions of the Court on elements of the crime, proximate cause, etc. Even if Amanda Burney's testimony was innocently false (mistaken) it cannot be allowed to form the basis for Dr. Bass' conviction.

The Court's murder instruction to the jury read as follows:

" INSTRUCTION NO. 5

In order to find the Defendant Guilty of Second Degree Murder (Sale of a Controlled Substance Causing Death), the State must prove each of the following elements beyond a reasonable doubt:

1. That on or about October 4-6, 2005, in Clark County, Nevada;

2. The Defendant unlawfully;

3. Killed a human being;

4. The death was proximately caused by a controlled substance;

5. The controlled substance was sold, given, traded or otherwise made available to the victim by the defendant;

3. In violation of Nevada Revised Chapter 453."

(Emphasis added) (X-2075)

Disregarding the disjointed paragraph 3 at the end, and the poor syntax of this instruction, it is clear that Paragraph 1. on or about October 4-6, 2005 encompasses not only the killing and death but the date(s) of making available the controlled substance as required in Paragraph 5. The State prepared and proposed this Instruction which is the only one with any dates or time frames relating to the murder charge.

Prosecutorial Misconduct (*Brady* Violations)

The State has never answered the question of when it knew the evidence was false. This despite the Nevada Supreme Court's Order directing a response on the false evidence issue (In Appendix).

A good summary of the Brady issues is in *United States v. Delray Price,* 566 P.3d 900 (9th Cir. May 21st, 2009) which although not establishing new law contains

an excellent discussion of Supreme Court Decisions: (*Brady v. Maryland* 373 U.S. 83 (1963), *Kyles v. Whitley*, 514 U.S. 419 (1995); *Giglio v. United States*, 405 U.S. 150 (1972), and *Napue v. Illinois*, 360 U.S. 264 (1959)) as to the failure to preserve/disclose exculpatory evidence and/or presenting/failing to correct false and misleading testimony and evidence. The Court notes:

"[E]xculpatory evidence cannot be kept out of the hands of the defense just because the prosecutor does not have it, where an investigating agency does. That would undermine *Brady* by allowing the investigating agency to prevent production by keeping a report out of the prosecutor's hands until the agency decided the prosecutor ought to have it. . ." *Blanco*, 392 F.3d at 388 (quoting *United States v. Zuno-Arce*, 44 F.3d 1420, 1427 (9th Cir. 1995)). Moreover, as we have previously held: actual awareness (or lack thereof) of exculpatory evidence in the government's hands, . . is not determinative of the prosecution's disclosure obligations. Rather, the prosecution has a duty to learn of any exculpatory evidence known to others acting on the government's behalf. Because the prosecution is in a unique position to obtain information known to other agents of the government, *it may not be excused from disclosing what it does not know but could have learned. Carriger v. Stewart, 132 f.3D 463, 479-80* (9th Cir. 1997) (*en banc*) (citations omitted) (emphasis added).

CONCLUSION

WHEREFORE Petitioner prays that his Petition for Writ of Certiorari be granted.

Respectfully Submitted

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182

(2) Supreme Court, U.S.
FILED

No. 101301 APR 20 2001

IN THE

SUPREME COURT OF THE UNITED STATES

HARRISTON L. BASS, JR., Petitioner
-vs.-
THE STATE OF NEVADA, Respondent

On Petition for Writ of Certiorari
To The Supreme Court of the State of Nevada

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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DISTRICT COURT
CLARK COUNTY, NEVADA
Filed May 6, 2008
Case No. C229628

JUDGMENT OF CONVICTION

The Defendant preciously entered a plea of not guilty to the crimes of **COUNT I – SECOND DEGREE MURDER** (Category A Felony) in violation of NRS 200.010, 200030, 453.333: COUNTS II thru L – **SALE OF A CONTROLLED SUBSTANCE** (Category C Felony) in violation of NRS 453.321(1)(4); COUNTS LI thru LVI - **POSSESSION OF A CONTROLLED SUBSTANCE FOR PURPOSE OF SALE** (Category D Felony) in violation of NRS 453.338; and the matter having been tried before jury and the Defendant having been found guilty of the crimes of **COUNT I – SECOND DEGREE MURDER** (Category A Felony) in violation of NRS 200.010, 200030, 453.333: COUNTS II thru L – **SALE OF A CONTROLLED SUBSTANCE** (Category C Felony) in violation of NRS 453.321(1)(4); COUNTS LI thru LVI - **POSSESSION OF A CONTROLLED SUBSTANCE FOR PURPOSE OF SALE** (Category D Felony) in violation of NRS 453.338; thereafter, on the 22nd day of April, 2008 the Defendant was present in court for sentencing with his counsel DAVID L PHILLIPS, ESQ and MICHAEL V STUFF, ESQ and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said offense (s) and, in addition to the $25 Administrative Assessment Fee, $60 Drug Analysis Fee, and $150 DNA Analysis Fee including testing to determine genetic markers, the Defendant is

SENTENCED to the Nevada Department of Corrections (NDC) as follows; as to **COUNT I** – LIFE in the Nevada Department of Corrections (NDC) with parole eligibility after a MINIMUM of TEN (10) YEARS IMPOSED and pay $14,147.95 Restitution; **COUNTS II thru L** – MINIMUM of TWENTY FOUR (24) MONTHS with a MAXIMUM of SIXTY MONTHS in NDC IMPOSED, COUNT II to run CONSECUTIVE to COUNT I, COUNT III to run CONSECUTIVE TO COUNT IV, COUNT IV to run CONSECUTIVE TO COUNT V, COUNT V to run CONSECUTIVE TO COUNT IV, COUNT VI to run CONSECUTIVE to Count V, COUNTS VII thru L to run CONCURRENT with COUNTS VI thru COUNTS XLIX; **COUNTS LI thru LVI** MINIMUM TWELVE (12) MONTHS with a MAXIMUM of THIRTY-SIX (36) MONTHS in NDC IMPOSED, COUNT LI to run CONSECUTIVE TO COUNT VI, COUNTS LII thru LVI to run CONSECUTIVE to COUNTS LI thru LV; with FIFTY-SEVEN (57) DAYS credit for time served.

Dated this 2 day of May, 2008

/s/Jackie Glass
JACKIE GLASS
DISTRICT JUDGE

(Judgment was reduced from 12 pages to 2 by removing repeated language)

DISTRICT COURT
Clark County, Nevada
Case No. 2229628
Filed: December 5, 2008

THE STATE OF NEVADA,
Plaintiff,
Vs.
HARRISTON L. BASS JR.,
Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL

On October 14, 2008, a hearing was held before the Court on Defendant's Motion for New Trial. Alan R. Johns appeared on behalf of the defendant, Harriston L. Bass, who was not present. Conrad Hafen, Chief Deputy Attorney General, appeared on behalf of the State of Nevada. After reviewing the trial transcripts, the pleadings submitted by the parties and listening to argument by counsel., the Court makes the following findings of fact and conclusions of law:

Defendant alleges he has discovered new evidence in this case and therefore a new trial should be granted. Defendant asserts this evidence is in the form of certain prescription pill bottles recovered by the victim's brother, Joey Micali, and turned over to the State. That the State never revealed this evidence to the Defendant and never introduced it at trial

Defendant further claims that several days after the trial ended, his attorneys discovered these prescription pill bottles and examined them. He believes that based on this examination, if these pill bottles had been available at trial the jury would have acquitted him of the second degree murder charge.

The Nevada Supreme Court has made it clear that a Defendant has a heavy burden to demonstrate how his proposed evidence is "newly discovered" and that a new trial is warranted In this regard the Court should consider seven factors when presented with a Motion for New Trial based on newly discovered evidence.

Those sever factors are: the evidence must be (1) newly discovered; (2) material to the defense; (3) such that even with the exercise of reasonable diligence it could not have been discovered and produced for trial; (4) non-cumulative; (5) such as to render a different result probable upon retrial; (6) such that it does not only attempt to contradict, impeach, or discredit a former witness, unless the witness is so important that a different result would be reasonable probable; and (7) the best evidence the case admits. A Defendant is required to prove each factor in his favor. Failing to meet this burden will result in the denial of the motion. Applying these factors to Defendant's proposed "newly discovered" evidence, the Court concludes that the Defendant has failed to sustain his burden.

The court notes that prior to the preliminary hearing the State provided the Defendant with copies of all investigative reports, witness statements and photographs relating to this case. Among these documents was a copy of a report reflecting DPS Detective Jennifer Reubart's interview with the deceased's brother, Joey Micali.

According to this report, Gina Micali's brother, informed Detective Reubart that a few days after Gina's funeral he, his wife and his mother went inside Gina's home. The purpose of this visit was to retrieve some of Gina's personal belongings. Joey told Detective Reubart that during this visit he discovered additional Allscripts

and non-Allscripts prescription bottles in Gina's kitchen hutch. Joey explained that while his wife and mother were outside Gina's home, he seized all the prescription bottles, took them to his house and placed them inside his gun safe. A month later he turned them over to Attorney Gary Cal, an associate with the law firm of Edward M. Bernstein & Associates.

The State also provided Defendant with a one page letter addressed to Detective Reubart and signed by Attorney Gary Cal. This letter documented the fact that Mr. Cal turned over eight (8) Allscripts prescription bottles to Detective Reubart. This letter is attached to Defendant's Motion for New Trial as exhibit B.

The preliminary hearing transcript also shows that the State called Detective Reubart to testify about these prescription bottles. While testifying, the prosecutor handed her a brown evidence bag. This bag contained the Allscripts prescription bottles she retrieved from Attorney Cal. After Detective Reubart testified as to how she came into possession of these bottles, the State moved for its admission. Defense counsel objected on the grounds of relevance and the court sustained the objection. As a result, the Allscripts prescription bottles were never introduced into evidence. (PHT193-97)

At trial, the Allscripts prescription bottles were marked as State's exhibit 12. The State called Joey Micali as a witness. Joey testified how he came to possess the items contained inside exhibit 12. However, when the prosecutor handed Mr. Micali exhibit 12 the Court called a bench conference with both parties and discussed the nature of this evidence off the record. (TT Day 3 p. 231-40)

During the bench conference the prosecutor informed the Court that he wanted to use this exhibit 12

contained the Allscripts prescription bottles Joey Micali recovered from Gina's home. The prosecutor remined the Court and defense counsel that the items in exhibit 12 were recovered from Attorney Gary Cal and that Mr. Cal was currently representing the Micali family in a wrongful death lawsuit against the defendant.

The Court expressed concern that admitting exhibit 12 into evidence would open the door to testimony about the lawsuit and that said testimony would prejudice the jury. Defense counsel agreed with the Court and objected to the admissibility of exhibit 12. At the conclusion of the bench conference the prosecutor asked Joey Micali a few more questions but did not attempt to introduce exhibit 12 into evidence. Defense counsel asked Mr. Micali one question on cross-examination and passed the witness (TT Day 3 p 238-40)

The court believes these facts reflect four separate instances where the Defendant was made aware that the State and/or Attorney Gary Cal possessed additional Allscripts and non-Allscripts prescription bottles. These are the same prescription bottles Defendant now claims constitutes "newly discovered evidence." In light of these facts, it is clear these prescription bottles are not newly discovered buts that the Defendant has known about them for the past two years. As a result, Defendant has failed to meet his burden of demonstrating that these prescription bottles constitute 'newly discovered evidence" and his Motion for New Trial is denied.

Defendant has also failed to meet his burden on several other Sanborn factors. For instance, based on the facts and evidence before the court, Defendant's proposed newly discovered evidenced could have been discovered with the exercise of reasonable diligence. Again, Defendant, was made aware of these prescription bottles

prior to the preliminary hearing. In fact, as previously noted, they were part of the State's evidence during the preliminary hearing. The court believes this gave Defendant sufficient notice of who was in possession of all the prescription bottles and who could be contacted in order to examine the bottles and their contents. Thereby, giving Defendant sufficient opportunity to make inquiry and examine this evidence.

The court agrees that Defendant's proffered evidence could have been used to impeach Clark County Coroner Investigator Amanda Burney. However, that alone is not a sufficient reason to grant a Motion for New Trial. The Defendant must also show that Ms. Burney is so important to the State's Case that a different result would be reasonably probable. As to this latter requirement the Defendant's argument lacks merit.

During trial Ms. Birney was thoroughly cross-examined by defense counsel. (TT Day3 p. 217-31). Defense counsel had in his possession the photographs of the Allscript bottles and the report documenting the contents of each bottles. He showed her this evidence and questioned the protocol she followed in destroying the Allscripts prescription pills and bottle. Defense counsel questioned Ms. Birney's search of the house for other prescription pills and what she did with the other prescription drugs found in the residence.

The court believes that if a new trial was granted and the defense was permitted to cross examine Ms. Birney with this new evidence, he answers would not necessarily be different. She would still testify where she found the Allscripts prescription bottle. She would still describe how she searched the house and why she did not search ever drawer or cupboard in the house. If asked about the prescription bottles found by Joey Micali, she

would readily state she never looked in the kitchen hutch drawers because that was not part of the coroner's protocol. Based on these likely answers, it is not reasonably probable that the proffered evidence would produce a different result. Therefore, Defendant has again failed to meet his burden on this factor and the Motion for New Trial is denied.

The court has considered Defendant's arguments as to the remaining *Sanborn* factors and finds they lack merit. As a result, Defendant has failed to sustain his heavy burden in this matter and has not demonstrated that new trial is warranted in this case.

Defendant also alleges that the criminal charges should have been dismissed because Clark County Coroner Investigator Amanda Birney destroyed the Allscripts and non-Allscripts prescription pil bottles after photographing them and recording their contents. Defendant alleges this conduct rises to the level of bad faith and therefore violated her right to a fair trial.

In Daniels v. State of Nevada, 114 Nev. 261, 956 111 (1998), the Nevada Supreme Court considered whether the State's failure to collect evidence required the criminal charges to be dismissed. The Court recognized that it had not previously articulated a rule addressing this issue and looked to the State of New Mexico for guidance.

In that regard the Court stated:

> At least one court, recognizing that injustices could arise from the State's failure to gather evidence under certain circumstances, has developed a test for failure to gather evidence. In State v. Ware, 118 N.M. 319, 881 p2d 679 (1994), the New Mexico Supreme Court established a two-part test. The first part requires the defense to

> show that the evidence was material, then the court must determine whether the failure to gather evidence was the result of mere negligence, gross negligence, or a bad faith attempt to prejudice the defendant's case. (citation omitted). When mere negligence is involved, no sanctions are imposed, but the defendant can still examine the prosecution's witnesses about the investigative deficiencies. (citation omitted). When gross negligence is involved, the defense is entitled to a presumption that the evidence would have been unfavorable to the State. Id. In cases of bad faith, we conclude that dismissal of the charges may be an available remedy based upon an evaluation of the case as a whole...We agree with the Ware Court's conclusion that, evidence from a crime scene...this rule is not absolute. (citations omitted) Accordingly, we approve of the approach articulated in Ware, and adopt a similar standard for Nevada. id at 267.

Applying the Daniels test to the facts in this case the court finds that the destroyed Allscripts prescription bottles and pills were material. However, there is no evidence of negligence, gross negligence or bad faith on the part of Clark County Coroner Investigator Amanda Birney. Ms. Birney testified that the Clark County Coroner's Office had an established a protocol for investigating cases of possible drug overdose. The evidence presented at trial indicates she followed that protocol.

In addition, Ms. Birney was not investigating a homicide. Rather she was investigating a possible proscriptiondrug overdose. The possibility that Gina

Micah's death may have been the result of a homicide did not arise until approximately eight months later.

This Court also notes that Ms. Birney did preserve this evidence. Ms Birney testified that she took photos of the bottle, counted each pill and record the number of pills left in the bottle. (TT Day 3 p. 197-217) Again, based on these facts, the court finds that the State did not engage in negligence, gross negligence or bad faith.

Defendant further alleges that his trial attorney was ineffective. The court believes this argument is premature and must be presented in a post conviction Petition for Writ of Habeas Corpus. Therefore, the court will not consider the merits of this argument at this time. Evans v. State of Nevada, 117 Nev. 609, 28 P3d 498 (2001)

Defendant also asks this court for fail pending his appeal to the Nevada Supreme Court. According to the record Defendant already filed a separate Motion for Bail Pending Appeal with the Nevada Supreme Court. The Court determined that Defendant failed to meet his heavy burden and denied the motion. At this time, the court finds no reason to rule counter to the Nevada Supreme Court's previous ruling and therefore denies Defendant's motion.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant's Motion to Dismiss is hereby denied.

DATED the 10th day of November, 2008

/s/ Jackie Glass

DISTRICT COURT JUDGE

SUBMITTED BY:
CATHERINE CORTEZ MASTO
Attorney General
By /s/ Conrad Hafen
Chief Deputy Attorney General

DISTRICT COURT
CLARK COUNTY, NEVADA
Filed April 22, 2008
Case No. C229628

THE STATE OF NEVADA,)
Plaintiff,)
vs.)
)
HARRISTON L. BASS, JR.,)
Defendant.)
)

ORDER

Good causing appearing, it is hereby ordered that the Clerk of the Court shall release State's exhibit 12A through F (Brown Paper Evidence Bag) to Pharmnet Investigator Jennifer Reubart under the following conditions:

1. Upon receiving Sate's exhibit 12A through F, Investigator Reubart shall book the exhibit into the evidence room maintained by the Pharmnet Task Force.
2. After exhibit 12 A through F has been booked into the evidence room, Defendant's Counsel and Attorney Gary Call shall arrange to meet with Investigator Reubart at her office in order to inspect this exhibit. This meeting must occur within 30 days from the date this order is filed.
3. During this meeting and in the presence of Defendant's Counsel and Gary Call, Investigator Reubart shall examine and photograph all the contents of this exhibit in the following manner:

a. Investigator Reubart shall open State's exhibit 12A through F, and take out all prescription pill bottles and/or any other item contained therein. Once the pill bottles have been take out, Investigator Reubart will empty the prescription bottles one at a time.

b. After emptying a prescription bottle, Investigator Reubart will count each pill contained in the bottle and photograph the pills and pill bottle. She will then give all counsel the opportunity to inspect the pills and the bill bottle. At the conclusion of this inspection, the pills will be returned to the respective bottle and the bottle placed back into the brown evidence bag. This procedure will be repeated for each individual prescription pill bottle contained in State's exhibit 12 A through F

c At the conclusion of this procedure Investigator Reubart , in the presence of all counsel, will reseal the brown evidence bad and give the exhibit 10 Attorney Gary Call.

IT IS SO ORDERED

DATED this 10 day of April, 2008.

/s/ Jackie Glass

DISTRICT COURT JUDGE

IN THE SUPREME COURT OF THE STATE OF NEVADA

CASE NO. 51822 AND 53072

FILED ON MAY 18, 2010

HARRISTON LEE BASS, JR.,
Appellant,
vs.
THE STATE OF NEVADA
Respondent.

ORDER OF AFFIRMANCE

These are consolidated appeals from a judgment of conviction, pursuant to a jury verdict, of 1 count of second-degree murder, 49 counts of sale of a controlled substance, and 6 counts of possession of a controlled substance for the purpose of sale, and from a district court order denying a motion for a new trial. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

A jury convicted appellant Dr. Harriston Lee Bass, Jr., of second-degree murder for selling a controlled substance that caused Gina Micali's death, 49 counts of selling a controlled substance, and 6 counts of possession of a controlled substance for the purpose of sale. After trial, a bag of prescription medications, which had been the State's proposed exhibit 12, was opened and examined by both parties at attorney Edward Bernstein's office who was handling a wrongful death suit related to this criminal proceeding. Because the bag allegedly contained all of the medications that Bass dispensed and sold to Micali on October 4, 2005, he moved for a new trial or dismissal based on newly discovered evidence, arguing that the State's theory that Micali died from medication Bass dispensed and sold her on October 4 was no longer viable. The district court denied the motion. Bass' appeals from his judgment of conviction and from the

denial of his motion for new trial were consolidated for decision.

On appeal, Bass argues that: (1) several jury instructions were erroneous; (2) the statutes under which he was charged and convicted are unconstitutionally vague, (3) three of the counts of which he was convicted are redundant, (4) the State's failure to preserve and collect evidence denied him due process; (5) the district court abused its discretion when it allowed testimony about a financial analysis regarding the prescription drugs he sold; (6) he was prejudiced by judicial misconduct; (7) the district court abused its discretion when it denied his motion to continue the trial; (8) the prosecutor had a conflict of interest; (9) he was prejudiced by prosecutorial misconduct; (10) the State failed to present sufficient evidence to support his conviction of selling controlled substances to Samuel Baker, (11) his sentencing was based on inadmissible, false, and inflammatory evidence; and (12) the district court abused its discretion when it denied his motion for a new trial or dismissal based upon newly discovered evidence.

For the reasons set forth below, we conclude that all of Bass' contentions are without merit. Accordingly, we affirm the judgment of conviction and the order denying a new trial. As the parties are familiar with the fact, we do not recount them further except as necessary to our disposition.

Jury instructions

Bass argues that Jury Instruction Nos. 6, 11, and 12 were erroneous We disagree.

"District courts have broad discretion to settle jury instructions" Cortinas v. State 124 Nev . , 195 P.3d 315, 319 (2008) We review a district court's refusal

of a jury instruction for an abuse of discretion or judicial error Id

Jury Instruction No 6

Bass contends that Jury Instruction No. 6 was incomplete because it did not define intervening cause within the proximate caused instruction.

In Williams v. State, 118 Nev. 536, 50 P.3d 1116 (2002), we approved a jury instruction regarding proximate cause. Id at 550, 50 P.3d at 1125. Here, Jury Instruction No. 6 was nearly identical to the instruction in Williams and was an accurate statement of the law regarding proximate cause. Moreover, Nevada law does not specifically define intervening cause. Therefore, we conclude that the district court did not abuse its discretion in not providing an additional instruction on intervening cause.

Jury Instruction No. 11

Bass asserts that Jury Instruction No. 11 improperly commented on the evidence and placed undue emphasis on the Board of Pharmacy's regulations. We conclude that Jury Instruction No. 11 is a proper recitation of NRS 453.226. While the instruction does not directly quote NRS 453.226, it nonetheless provides all of the information included in the statute and does not misstate the law. Accordingly, the district court did not abuse its discretion in giving the instruction. In addition, we note that Bass has failed to provide citations to legal authority in support of his argument that Jury Instruction No. 11 is an incorrect statement of the law.

Jury Instruction No. 12

Bass argues that Jury Instruction No. 12 is a misstatement of the law, improperly comments on the evidence, and places undue emphasis on the Board of Pharmacy's regulations.

NRS 453.321 (1) states that "[e]xcept as authorized by the provisions of NRS 453.011 to 453.552, inclusive, it is unlawful for a person to: (a) [i]mport, transport, sell, exchange, barter, supply, prescribe, dispense, give away or administer a controlled or counterfeit substance." (Emphasis added.) NRS 453.321 (\$) provides the penalties for violating subsection 1 in matters concerning a schedule III, IV, or V controlled substance.

Jury Instruction No. 12 stated:

> Pursuant to Nevada Revised Chapter 453.321 (1)(4), it is unlawful for a medical doctor to sell, supply dispense or transport or attempt to sell. Supply, dispense or transport prescription drugs containing a schedule III (three) controlled substance if that medical doctor has not been issued a dispensing certificate pursuant to the Nevada Board of Pharmacy regulations or has failed to renew the dispensing certificate pursuant to Nevada Board of Pharmacy regulations.

(Emphasis added.)

We conclude that Jury Instruction No. 12 is an accurate statement of the law. Although the instruction here employed the term "medical doctor" instead of "person." The term used in the statute, the district court did not render the instruction inaccurate by tailoring the instruction to the specific facts of the case. The instruction was also correct because the State did not argue that Bass had violated NRS Chapter 453 by prescribing hydrocodone, but rather by selling it. Finally, the instruction did not improperly comment on the evidence or pace undue emphasis on the Board of Pharmacy's regulations because, as noted in NRS 453.226, the only way to dispense drugs is to register with the Board of Pharmacy. Accordingly, Jury Instruction No

12 merely incorporates aspects of NRS 453.321 and NRS 453.226, and is not an inaccurate statement of the law. [1]

Vagueness

Bass contends that the statutes under which he was charged and convicted are unconstitutionally vague. We disagree.

A statute's constitutionality is a question of law that we review de novo. Nelson v. State, 123 Nev. 534, 540, 170 P.3d 517, 522 (2007). Statutes are presumed valid, and the challenger of the law has the burden of proving its unconstitutionality. Id.

A statute containing a criminal penalty is unconstitutionally vague if "vagueness so permeates the text" that the statute (1) fails to provide notice sufficient to enable ordinary people to understand what conduct is prohibited and (2) authorizes or encourages arbitrary and discriminatory enforcement, in most applications. Flamingo Paradise Gaming v. Att'y General. 125 Nev. _____, _____, 217 P.3d at 546, 553-54 (2009). "[A] statute will be deemed to have given sufficient warning as to proscribed conduct when the words utilized have a well settled and ordinarily understood meaning when viewed in the context of the entire statute." Nelson, 123 Nev. At 540-41, 170 P.3d at 522 (quoting Williams v. State, 118 Nev. 536, 546, 50 P3d 1116, 1122 (2002)

NRS 200.010

NRS 200.010 states that "[m]urder is the unlawful killing of a human being...[c]aused by a

---

[1] Bass also argues that Jury Instruction No. 5 was erroneous because it did not state that the jury must find that he violated NRS Chapter 453. We conclude that this argument is without merit as the instruction specifically stated that the jury musts find a "violation of Nevada Revised Chapter 453."

controlled substance which was sold, given, traded or otherwise made available to a person in violation of chapter 453 or NRS."

We conclude that Bass' challenge to NRS 200.010 is without merit. The words of NRS 2--.-1- have a well=settled meaning and clearly put an ordinary person on noticed that it is unlawful to kill a human being by illegally selling him a controlled substance. Accordingly, vagueness does not permeate the text of NRS 200.010 such that it fails to provide sufficient notice and authorizes arbitrary enforcement. Therefore, NRS 200.010 is not unconstitutionally vague.

NRS 453.333

NRS 453.333 governs the penalties for making available controlled substances that cause death. It provides, in pertinent part:

> If the death of a person is proximately caused by a controlled substance which was sold, given, traded or otherwise made available to him... by another person who sold, gave or traded or otherwise made the substance available to him. .is guilty of murder.

We conclude that NRS 453.333 is not unconstitutionally vague. The words of NRS 453.333 are well settled and have an ordinarily understood meaning: a person commits murder it, in violation of this chapter, he sells or makes available a controlled substance that is the proximate cause of one's death. Therefore, vagueness does not so permeate the text of NRS 453.333 such that it fails to provide sufficient notice and authorizes arbitrary enforcement. Accordingly, NRS 453.33 is not unconstitutionally vague

NRS 453.321

In pertinent part, NRS 453.321 provides that "[e]xcept as authorized by the provisions of NRS 453.011

to 453.011 to 453.552, inclusive, it is unlawful for a person to: (a) [i]mport, transport, sell, exchanger, barter, supply, prescribe, dispense, give away or administer a controlled or counterfeit substance."

We conclude that the use of the term "person" in MRS 453.321 as opposed to "physician" or "practitioner," does not render the statute vague.

Accordingly, we concluded that the statutes under which Bass was charged and convicted were not unconstitutionally vague because they sufficiently put him on notice of the prohibited conduct as the words utilized have a well-settled meaning when viewed in the context of the entire statute.

Redundancy of counts 51,52, and 53

Bass asserts that his convictions on counts 51, 52, and 53, which charged him with the unlawful possession of Norco, Lorcet, and Lortab, respectively, for the purpose of sale, are redundant because "[A all three contain the same substance, hydrocodone, and only differ in brand name.

"[A] claim that convictions are redundant stems from the legislation itself and the conclusion that it was not the legislative intent to separately punish multiple acts that occur close in time and make up one course of criminal conduct" Wilson v. State, 121 Nev. 345, 355, 114 P.3d 285, 292 (2005). Thus, convictions are redundant "when the facts forming the basis for two crimes overlap, when the statutory language indicates one rather than multiple criminal violations was contemplated, and when legislative history shows that an ambiguous statute was intended to assess one punishment." Id at 355-36, 114 P.3d at 292-03 (citations omitted).

NRS 453.338(1) states:

> Except as authorized by the provisions of NRS 453.011 to 453.552, inclusive, it is unlawful for a person to possess for purpose of sale any controlled substance classified in schedule III, IV, or V.

The clear import of NRS 453.338 is to criminalize the possession of certain controlled substances for the purpose of sale, unless the possessor was authorized to do so. There is nothing within the statutory language of NRS 453.338(1) that indicates the Legislature did not intend to separately punish multiple acts that occur during the course of criminal conduct. The evidence also demonstrated that from 2003 to 2006, Bass received multiple shipments of prescription drugs, including Norco, Lorcet, and Lortab all of which are schedule III or IV, or V substances for the purpose of sale. The evidence showed that Bass would sell these prescription drugs to patients after receiving the shipments. Therefore, the underlying acts that formed the basis of Bass' convictions were separate, did not overlap, and arose from multiple, repeated events. Accordingly, counts 51, 52, and 53 were properly charged separately and Bass' convictions were not redundant.

The State's failure to preserve evidence

Bass asserts that he was denied due process because the State failed to properly preserve potentially exculpatory evidence. Specifically, he contends that the State failed to preserve the prescription bottles found at the Micali's residence and her blood sample. We conclude that Bass was not denied due process by the failure to preserve this evidence.

The State's failure to preserve and collect evidence violates a defendant's right to due process "only if the defendant shows either that the State acted in bad faith or

that the defendant suffered undue prejudice and the exculpatory value of the evidence was apparent before it was lost or destroyed." Leonard v. State, 117 Nev. 53, 68, 17 P.3d 397, 407 (2001) (emphasis added0. "Where there is no bad faith, the defendant has the burden of showing prejudice." Id to meet this burden the defendant must show that the State could have reasonably anticipated that the evidence sought would be exculpatory and material to [the] defense." Id, (internal quotation omitted). It is insufficient for the defendant to support his argument with a mere "hoped for conclusion" or by stating that the evidence would have helped the defense in its trial preparation. Id, (internal quotations omitted).

Failure to preserve prescription bottle

Bass claims that he was denied due process because Investigator Burney testified that at the time she destroyed the prescription bottles and the drugs found therein, Micali's death was a suspected drug overdose, she recorded all of the prescription bottles and the amount of drugs contained therein and disposed of them pursuant to protocol. Given the circumstances, there is no evidence to suggest that Investigator Burney acted in bad faith.

Bass has also failed to demonstrate the he suffered undue prejudice as a result of Investigator Burney's actions. Though the bottles and drugs were not available to Bass at trial, Bass was in possession of Investigator Burney's report and photographs that documented she evidence. Bass used the report and the photographs to impeach Burney's report and photographs gave Bass the same information that the actual bottles and drugs would have provided. Further because Micali's death was a suspected overdose and did not become a homicide investigation until seven months later, the evidence's exculpatory value, if any was not apparent before it was

destroyed. Accordingly we conclude that Bass suffered no undue prejudice as a result of Investigator Burney's actions. Therefore, Bass' due process rights were not violated.

Failure to preserve blood sample

Bass argues that his right to due process was violated because the State failed to preserve Micah's blood sample.

In October of 2005, Micah was found dead in her residence. At the time her death was a suspected drug overdose. Bass was not connected to Micah's death until June of 2006, when Detective Reubart reviewed the medical records seized at Bass' residence. Bass was subsequently arrested for Micah's death in December of 2006. Therefore, for approximately seven months to one year after Micah's death, Bass was not a suspect in her death. Accordingly, we conclude that the State did not act in bad faith when it failed to preserve Micah's blood sample.

Bass has also failed to show undue prejudice. Micah's toxicology report was available to Bass and he had a full opportunity to cross-examine Dr. Gary Telgenhoff, who performed the autopsy on Micah and reviewed the toxicology report. He also had a full opportunity to cross-examine Chip Wall, who had also reviewed Micah's toxicology report. Further, Dr. Telgenhoff's autopsy finding of frothy fluid in Micah's lungs was consistent with the established lethal level of hydrocodone present in her blood. Therefore, Bass has not demonstrated that the State could have reasonably anticipated that the blood sample would be exculpatory and material to his defense before it was destroyed.

Accordingly, we conclude that Bass' due process rights were not violated.[2]

Testimony concerning financial analysis

Bass argues that the district court abused its discretion when it permitted Detective Reubart to testify about the financial analysis she conducted regarding the controlled substances Bass sold. On appeal, he asserts that her testimony was irrelevant and constituted inadmissible prior bad act evidence. However, Bass failed to object to Detective Reubart's testimony on these bases at trial. Rather, Bass objected to her testimony on the grounds that she was unqualified to testify about his finances.

When a defendant asserts new grounds for objection on appeal, we employ plain error review. Green v. State, 119 Nev. 542, 545, 80 P.3e 93, 94-95 (2003). "in conducting plain error review, we must examine whether there was 'error', whether the error was 'plain' or clear, and whether the error affected the defendant's substantial rights." Id. The appellant bears the burden of establishing that his substantial rights were affected by "show[ing] actual prejudice or a miscarriage of justice." Id.

Because Bass failed to preserve this issue for appeal he has the burden of establishing that his substantial rights were affected by showing prejudice. He has made no attempt to do so in his briefs. Moreover, the record contains substantial evidence supporting the jury's

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[2] We note that we have considered Bass' argument relating to the State's subpoena of the non-Allscripts bottles at Edward Bernstein's office, Bass has failed to support his argument with citations to the record. See NRAP 28(e). Nevertheless, we conclude that Bass has failed to demonstrate how the non-Allscripts bottles were material

verdict. Accordingly, we determine that Bass' substantial rights were not affected by the financial analysis testimony.

Judicial misconduct

Bass contends that he was denied his right to a fair trial as a result of judicial misconduct. We disagree.

We have recognized that the words and actions of the district court may shape the opinion of the jury members, and therefore, prejudice the defendant. Oade v. State, 114 Nev. 619, 624, 960 P.2d 336, 339 (1998). In making this determination, we review the district court's conduct in it entirety and seek to determine whether it influenced the jury's verdict. Id.

During the reading of the charges, the district court judge allegedly "made faces" and shook her head in the negative. The district court judge also joked with the jurors that they should not feed the bailiff. Bass objected to this conduct. Having reviewed the district court's conduct in its entirety, we determine that it was not so egregious as to influence the jury's verdict. Further, Bass failed to object to the remaining alleged instances of judicial misconduct. We have reviewed Bass' arguments and conclude that he has failed to meet his burden of establishing that his substantial rights were affected by showing actual prejudice or a miscarriage of justice. See id. at 621-22, 960 P.2d at 338 ("judicial misconduct must be preserved for appellate review, failure to object or assign misconduct will generally preclude review by this court" unless there is plain error that affected the defendant's substantial rights.). Accordingly, we conclude that Bass was not denied his right to a fair trial.

Bass' motion to continue the trial

Bass requested a continuance on the first day of trial due to his need to organize documents. Bass argues

the district court abused it discretion when it denied this motion.

We review a "district court's decision regarding a motion for continuance for an abuse of discretion." Rose v. State, 123 Nev. 194, 206, 163 P.3d 408, 416 (2007). The district court's decision to deny a continuance is not an abuse of discretion if the defendant "fails to demonstrate that he was prejudiced by the denial." Id.

The record demonstrates that the documents Bass wanted to organize had been available to the defense for approximately eight months. Bass has failed to demonstrate that he was prejudiced by the district court's denial of his motion. Accordingly, we conclude that the district court did not abuse its discretion in denying Bass' motion to continue.

Conflict of interest

Bass argues that the district court erred when it denied his motion to disqualify the attorney general's office from prosecuting him for having a conflict of interest allegedly arising from that office's former representation of him.

"The disqualification of a prosecutor's office rests with the sound discretion of the district court." Collier v. Legakes, 98 Nev. 307, 309, 646 P2d 1219, 1220 (1982). "In exercising that discretion, the trial judge should consider all the facts and circumstances and determine whether the prosecutorial function could be carried out impartially and without breach of any privileged communication." Id at 310, 646 P.2d at 1220. "Generally, a prosecutor is disqualified from personally acting in a criminal case if he has previously represented the accused in the same or a similar matter." Brinkman v. State, 95 Nev. 220, 222, 592 P.2d 163, 164 (1979).

The district court held a hearing on Bass' motion. It considered that in 1998, the attorney general's office represented Bass in a civil suit, whereas here the attorney general's office was proceeding against him in a criminal proceeding. Further, the attorney who prosecuted Bass in this case joined the office in 2003. We conclude, given the circumstances, that the district court did not abuse its discretion in finding that this was not an extreme case of an appearance of impropriety and that the attorney general's office could carry out it prosecutorial duty impartially without prejudice to Bass.

Prosecutorial misconduct

Bass contends that he was prejudiced by prosecutorial misconduct when the State misled the jury into believing that Micah died from hydrocodone that she purchased from Bass on October 4, 2005, she could not have died from any medication he sold her on that date. Bass failed to object to the State's theory during opening and closing arguments and did not object to any of the testimony he now contests. Accordingly, we employ plain error review, Green, 119 Nev. at 545, 80 P.3d at 95.

Bass has made no showing that the State's actions affected his substantial rights by causing prejudice. The State's theory that Micah died from hydrocodone that she bought from Bass on October 4, 2005, was supported by the evidence. Specifically, Detective Reubart testified that Bass sold Micah three bottles of Lorcet on October 4, 2005. The State also introduced Investigator Burney's medication receipt that indicated that the half-full bottle of hydrocodone she found in Micah's residence had been sold on October 4, 2005. Therefore, we conclude Bass has failed to demonstrate how the State's theory of the cause of death affected his substantial rights.

Sufficiency of evidence

Bass contends that because Samuel Baker, one of the individuals to whom Bass was convicted of selling controlled substances to, did not testify at trial, there was insufficient evidence to convict him of selling controlled substances to Baker.

In reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. "" Id. (quoting Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 44, 47 (1984))).

We conclude that there was sufficient evidence to support Bass' conviction of selling controlled substances to Baker. In support of these charges, the State introduced Baker's medical records that it seized from Bass' residence. This evidence, coupled with Bass' testimony that he saw Baker three times and each time sold him Norco (a brand of hydrocodone), was sufficient for a rational juror to find that Bass sold hydrocodone to Baker on three occasions.[3]

Bass' sentencing

Bass argues that his sentencing was improper because it was based on inadmissible, false, and inflammatory evidence. Specifically, Bass asserts that the

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[3] We note that we have considered Bass' Confrontation Clause argument relating to Baker and conclude that it is without merit. The Confrontation Clause precludes the admission of testimonial hearsay unless the declarant is unavailable and the defendant bad a prior opportunity for cross-examination." Thomas v. State, 122 New. 1361, 1367 n.8 (2006). Bass created the medical records seized at his residence and they did not contain any hearsay statements by Baker. Accordingly, Bass' right to confront Baker was not violated.

presentence investigation report (PSI) stated that he was guilty of causing multiple deaths.

We have consistently afforded the district court wide discretion in its sentencing decisions. See Houk v. State, 1103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). Accordingly, we will refrain from interfering with the sentence imposed, "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

We conclude that the PSI did not contain erroneous information. It clearly stated that Bass did not have a precious criminal record. The PSI only listed three individuals who had overdosed on controlled substances prescribed by Bass. Further, there is no evidence that the district court relied on this portion of the PSI in sentencing Bass. Accordingly, we conclude that the record does not demonstrate that Bass was prejudiced by consideration of impalpable or highly suspect evidence.

Bass' motion for a new trial or dismissal based on newly discovered evidence

Bass contends that the district court erred when it denied his motion for a new trial or dismissal based on the controlled substances found in the State's proposed exhibit 12. We disagree, because we conclude that this evidence was not newly discovered.

Pursuant to NRS 176.515 (1), a district court may grant a new trial on the ground of newly discovered evidence. The decision to grant a new trial on this basis is within the district court's discretion and we will not reverse the decision absent an abuse of discretion. Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284 (1991). In Sanborn, we stated:

> To establish a basis for a new trial on this ground the evidence must be: newly discovered: material to the defense; such that even with the exercise of reasonable diligence it could not have been discovered and produced for trial; non-cumulative; such as to render a different result probable upon or discredit a former witness, unless the witness is so important that a different result would be reasonably probable; and the best evidence the case admits.

Id. At 406, 812 P.2d at 1284-85 (footnote omitted) (emphasis added).

We conclude that the district court did not abuse its discretion when it found that the three bottles of Xanax and five bottles of Norco contained within proposed exhibit 12 were not newly discovered. In support of its finding, the district court listed four instances when Bass was informed of the proposed exhibit's contents: (1) during the preliminary hearing, the State provided Bass with a document that indicated that Joseph Micali told Detective Reubart that he retrieved prescription bottles from Gina Micali's home that he later turned over to Gary Call, as associate at Edward Bernstein's law office; (2) the preliminary hearing transcript demonstrates that the State attempted to introduce exhibit 13, which contained the prescription bottles Joseph Micali retrieved from Gina Micali's residence; (3) the State provided Bass with a letter from Call to Detective Reubart that stated that Call turned over eight Allscripts prescription bottles to Detective Reubart; and (4) during trial, leading up to the State's attempt to introduce proposed exhibit 12, Joseph Micali testified that he put the prescription bottles he retrieved from Gina Micali's residence in a brown bag. Accordingly, the district court's firmly rooted in evidence

and, therefore, not an abuse of its discretion. Because we conclude that the evidence contained within proposed exhibit 12 was not newly discovered, we need not address the remaining Sanborn factors. Therefore, the district court did not abuse its discretion when it denied Bass' motion for a new trial.[4] Accordingly, for the foregoing reasons we

ORDER the judgment of the district court AFFIRMED.

/s/ Cherry J.
Cherry

/s/ Saitta J.
Saitta

/s/ Gibbons J.
Gibbons

[4] We note that Bass argues that he received ineffective assistance of counsel. This issue, however, is not appropriate on direct appeal. See Corbin v. State, 111 Nev. 378, 381, 892 P.2d 580, 582 (1995) ("[T]his court has consistently concluded that it will not entertain claims of ineffective assistance of counsel on direct appeal.")

IN THE SUPREME COURT OF THE STATE OF NEVADA
FILED SEPTEMBER 29, 2010
CASE NOS 51822 AND 53072 CONSOLIDATED

HARRISTON LEE BASS, JR.,)
Appellant,)
vs.)
THE STATE OF NEVADA,)
Respondent.)
_____)
HARRISTON LEE BASS, JR.,)
Appellant,)
vs.)
THE STATE OF NEVADA.)
_____)

ORDER DENYING REHEARING

REHEARING DENIED. NRAP 40(c).

IT IS SO ORDERED.

/s/_____, J.
Cherry

/s/_____, J.
Saitta

/s/_____, J
GIBBONS

IN THE SUPREME COURT OF THE STATE OF NEVADA

FILED NOVEMBER 24, 2010

CASE NOS 51811 AND 53072 CONSOLIDATED

HARRISTON LEE BASS, JR.,)
Appellant,)
vs.)
THE STATE OF NEVADA,)
Respondent.)
)

HARRISTON LEE BASS, JR.,)
Appellant,)
vs.)
THE STATE OF NEVADA.)
)

ORDER DIRECTING ANSWER TO PETITION FOR EN BANC RECONSIDERATION

Appellant has petitioned this court for en banc reconsideration of the order of affirmance entered by a panel of this court on May 18, 1010 Having reviewed the petition, it appears that an answer will assist the court in resolving the issues presented. Accordingly, respondent shall have 15 das from the date of this order within which to file and serve an answer to the petition. See NRAP 40A. Respondent's Answer shall be limited to the first issue raised by appellant, namely, whether the conviction was based on false evidence. We stay issuance of the remittitur in this appeal pending resolution of the petition for en banc reconsideration.

IT is so ORDERED

/s/ _____ ACJ

Hardesty

IN THE SUPREME COURT OF THE STATE OF NEVADA
FILED JANUARY 20 2010
CASE NOS 51822 AND 53072 CONSOLIDATED

HARRISTON LEE BASS, JR.,)
Appellant,)
vs.)
THE STATE OF NEVADA,)
Respondent.)
_____)
HARRISTON LEE BASS, JR.,)
Appellant,)
vs.)
THE STATE OF NEVADA.)
_____)

ORDER DENYING EN BANC RECONSIDERATION

Having considered the petition on file herein, we have Concluded that en banc reconsideration is not warranted. NRAP 40A. Accordingly, we

ORDER THE PETITION DENIED.

/s/_____ C.J.
Douglas
/s/_____ J.
Cherry
/s/_____ J.
Gibbons
/s/_____ J
Hardesty
/s/_____ J
Saitta
/s_____ J
Pickering
/s_____
Parraguirre

IN THE SUPREME COURT OF THE STATE OF NEVADA
FILED FEBRUARY 11, 2011
CASE NOS 51811 AND 53072 CONSOLIDATED

HARRISTON LEE BASS, JR.,)
Appellant,)
vs.)
THE STATE OF NEVADA,)
Respondent.)
_____)
HARRISTON LEE BASS, JR.,)
Appellant,)
vs.)
THE STATE OF NEVADA.)
_____)

ORDER DENYING MOTION

This Court entered its judgment in this matter on May 18, 2010, affirming the judgment of conviction. See NRAP36(a) ("The filing of the court's decision or order constitutes entry of the judgment.") Appellant petition for a rehearing of the panel's judgment, se NRAP 40(a), which was denied. Appellant then petition for en banc reconsideration of the panel's judgment, see NRAP 40A, which also was denied. Appellant now has filed a "Motion for Leave to File a Response to Response to Respondent's Answer to Petition for En Banc Reconsideration; and, If Granted, for Related Relief." In that motion, appellant seeks leave to file a reply to the State's answer to the petition for en banc reconsideration and effectively sees rehearing of the order denying the petition for en banc reconsideration.

NRAP 27(a)(1) provides that "[a]n application for an order or other relief is made by motion unless thee Rules

prescribe another form." NRAP 40 specifically addresses the manner of seeking rehearing of the court's decision in a case. and NRAP 40A specifically addresses the manner of seeking en banc reconsideration of a panel's decision in a case. Neither rule contemplates a rehearing of an order denying en banc reconsideration. No good cause appearing, the motion is denied.

It is ORDERED.

/S/ _____, C.J.
DOUGLAS

IN THE SUPREME COURT OF THE STATE OF NEVADA

Filed June 17, 2010

Case Nos. 51822 and 53072 (consolidated)

HARRISTON LEE BASS, JR.
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

HARRISTON LEE BASS, JR.
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

APPELLANT'S PETITION FOR REHEARING

COMES NOW, Appellant HARRISTON LEE BASS JR. by and through his attorneys R. Paul Sorenson, Esq., and Alan R Johns, Esq., and petitions the Court for a rehearing of the Order of Affirmance filed and entered this Court on May 18, 2010 in the above consolidated appeals. This Petition is brought pursuant to NRAP 40 **Petition for Rehearing.**

General Facts and Background

Despite the extensive record and briefing, this is a factually simple case. The Court (Panel) in Its Order of Affirmance ("OA") does not recount the facts, "except as

necessary to our disposition" (OA-2). "Bass" will, present soe facts in Argument as related to certain of the Court's dispositions.

Dr, Harriston Bass was a long time medical practitioner in Clark County, Nevada during which he was authorized to and did provide medications including the controlled substances now in question. During much of his medical practice, Dr Bass delivered to his patients prescription medication. Later he became almost exclusively an on-call doctor and advertised as such. Dr. Bass kept detailed records of all medications delivered to or prescribed to this patients. At trial he acknowledged providing all medications itemized in 50 0f the 56 counts (including the October 4th delivery to Gina Micali).

A Judgment of Conviction (jury trial) was entered against Bass on May 6 2008 imposing a life sentence on the murder charge with 5 of the remaining 50 counts to run consecutively. All 56 counts of which Bass was convicted were based upon alleged violations of NRS 453.321 and NRS 453.231-232 dispensing a controlled substances without bing registered by the pharmacy board.

Although whether Bass was registered would appear a rather perfunctory matter, the State found it necessary to call four witnesses (including Detective Reubart) to explain that he wasn't (or shouldn't have been). To compound this issue the Trial Judge effectively told the jury that he wasn't registered and then to assure his conviction instructed them that ignorance of the law is no excuse..(X-002091-Instruction 21).

ARGUMENT

Introduction

This is a case for first impression and one presenting significant constitutional issues. What we have here is a licensed medical doctor who delivered to his patients prescription medications/controlled substances for use pursuant to his specific directions. All medications were delivered in bottles sealed and labeled by a reputable pharmaceutical company (Allscripts). Dr. Bass maintained complete files for all patients reflecting each visit, physical exam, symptoms, and all medications delivered or prescribed.[1]

Consistent with the limitations of NRAP 40, Dr. Bass will focus this Petition for Rehearing primarily on two issues:

1. **The conviction was obtained through false evidence.** Bass is mindful that the Court did address and resolve a number of related issues. For example the Panel affirmed Judge Glass" denial of the Motion for New Trial based on Newly Discovered Evidence and mentioned four instances were Bass was supposedly informed of the contents of proposed Exhibit 12 (OA 17 & 18). While Bass factually disagrees with the finding that the evidence that was introduced at trial was false. Additional examples will be cited in Argument.

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[1] The basis for every charge brought against Dr. Bass was derived from the review of his own records seized by the State pursuant to a search warrant the 1st day of June, 2006. The exact date these seized records became next available to Bass is uncertain, bu we know that neither he nor anyone in his behalf had access to the sealed affidavit for the search warrant since that was ordered to be provided b Judge Bell on the 3rd day of January, 2008

2. **The unconstitutionally vague and indefinite statutory scheme.** This resulted in Dr. Bass being selected for prosecution and his ultimate conviction. The Court addresses the unconstitutional vagueness of this statute (OA 5,6,& &(and discsses three statute NRS 200.020, 453.3333, and 453.321. Of particular concern, and leading Bass to believe that the Court misapprehended his constitutional issue, is the discussion related to NRS 453.321 (OA7)and the absence of a discussion of NRS 453.231. Commencing with NRS 200.010 and NRS 453.333, the inquiry into if and when we have unlawful conduct seems to never end. When we get to NRS 453.321, 23 find the language "Except as authorized by the provisions of NRS 453.011 to 453.552 (the entire controlled substance statute). Interestingly, NRS Chapter 630 covers the medical profession. The authorizations are in that Chapter rather than 453.[2]

FIRST ISSUE – False Evidence and Testimony

The presentation of this issue necessitates the discussion of a number of related questions. In doing so,

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[2] **NRS 630.020 "Practice of Medicine" defined.** "Practice of medicine" means: 1. To diagnose, treat, correct, prevent or prescribe for any human disease, ailment, injury, infirmity, deformity or other condition, physical or mental, by any means or instrumentality,including but not limited to the performance of an autopsy. (Emphasis added).

Bass is not necessarily suggesting that the Court overlooked or misapprehended each legal and factual question within a separate context. While respectfully disagreeing with many of the findings and conclusions in the Order of Affirmance, it is the interrelated and cumulative effect of these which resulted in a verdict which was erroneous and unconscionable. There are four key players in the presentation of the false evidence.

a). Amanda Burney. Ms Burney is the coroner investigator who failed to preserve the evidence. She flushed the pills down the toilet and destroyed the bottles. The Court found this to have been done in good faith thereby essentially eliminating one ingredient of the due process destruction/failure to preserve evidence claim. Admittedly, it is difficult to attribute bad faith motives to Ms. Burney's efforts. She was a novice coroner investigator and everything pointed to accidental drug ovedose. Unfortunately, good faith endeavors do not alter the fact that Bass was denied his right of confrontation.[3] This destruction of evidence paved the way for subsequent promulgation of the false evidence and records. She told the jury that the bottle she destroyed was given Micali on October 4th, 2005, by Bass and was missing 51 pills. The end result is the same whether she lied or was merely mistaken.

The Court also support Its decision with the observation that Amanda Burney did preserve (or attempt to preserve) the evidence by taking photographs. Unfortunately among Burney's shortcomings in this investigation, was her inability to take a legible photograph She herself acknowledged being unable to

[3] See Sparks v. Sate, 104, Nev. 316, 319, 759 P.2d 180(1988) discussing the separate prejudicial prong TT

read the label of the critical Allscripts bottle in question (S.A. 0 11-233-235).[4]This became an important question in Bass' Motion for a New Trial Based on Newly Discovered Evidence when the State argued that Bass should have known the bottle that Burney destroyed was not delivered to her on October 4th, 2005 (a day before her death) as she testified. If the author of this photograph can't read it, the suggestion that defense counsel cold or should have is hardly convincing. This Court will recall that this photograph was among the exhibits requested the Court to obtain the originals from the District Court Clerk for its review (See Motion filed January 23, 2009). Te Court denied this Motion, but Bass would still request and prefer that the Court to review the original to determine if anyone including Judge Glass and the jury could read the label.

Even if the pictures were perfect, we have no contents and only Amanda Burney's testimony that these pills were hydrocodone or any other "controlled or counterfeit substance." NRS 453.321(1)(a).

b) Jennifer Reubart promulgated the false evidence. Unlike Amanda Burney, Detective Reubart cannot rely upon good faith or investigative protocol. Her investigation of Bass was entirely criminal in nature. She relied upon the erroneous information provided by Burney. Reubart's affidavit in support of the criminal complaint mirrors Burney's erroneous assumption and the trial arguments of the prosecutor. Said affidavit filed December 19th2006 states: "According to medical records seized during the service of a search warrant your affiant

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[4] This acknowledgment was at the Preliminary Hearing but she was looking at the same photograph introduced at trial (Exh.-15J).

learned that on October 4th, 2005 Bass sold a controlled substance being 300 d/u of 10 mg. hydrocodone, a Schedule III Controlled Substance, at 2505 Tournament, Las Vegas, Clark Count, Neada 89142, to Gina Micali, causing her death from hydrocodone intoxication on October 6th, 2005." (1-0021-0022). (emphasis added).

Detective Reubart had access to all of Dr. Bass' records. She also received from Attorney Bernstein's office on or about August 15th, 2006 eight prescription bottles which apparently became contained in proposed Exhibit 12 at the time of trial. Interestingly, Attorney Bernstein had 17 prescription bottles received from Joey Micali Gina's brother. It was not until two years later, after Bass' conviction, and in anticipation of a Newly Discovered Evidence Motion that the reason the other 9 bottles wee not subpoenaed became known.. . "these were subpoenaed for criminal procedures according to wat out criminal case –what the crux of our criminal case was." (S.A. Volume I 000106 lines 15-17).

The State's failure to subpoena the non-Allscripts bottles is material and particularly so once we eliminate the bottle and contents destroyed by Amanda Burney as having been provided by Bass on October 4th, 2005. If we have one conclusively established murder weapon, the existence of similar but unrelated weapons may not be material. However, and as reflected in Bernstein's 17 bottle listing (S.A.-Volume I-85)(Exhibit C to the Declaration of R Paul Sorenson, Esq.), Bernstein not only had all the bottles delivered by Dr. Bass on October 4th but 9 others including 7 prescription bottles from Savon-Drugs, Walgreens, and CVS Pharmacies some empty or half-filled bottles of hydrocodone.

Even if we assume that hydrocodone was the cause of Gina Micali's death: Appellant submit that it is

impossible to say that the jury if properly informed of the real evidence would not have reached a different result. In a criminal case a different result would only require that one juror change his vote.

C). Prosecutorial Misconduct/Brady Violation. The Court's Order of Affirmance (applying a plain error review) justifies the State's closing and opening argument: "The State also introduced Investigator Burney's medical receipt that indicated the half-full bottle of hydrocodone she found in Micali's residence had been sold on October 4th, 2005. Therefore we conclude that Bas has failed to demonstrate how the State's theory of the cause of death affected his substantial rights." (OA 14 & 15). The Panel is correct that such evidence was presented; however, it was false evidence and the prosecutor knew it was false. The prosecutor cannot evade his prosecutorial responsibilities by blaming the ineffectiveness or incompetence of defense counsel nor should this Court allow him to do so.

At lest two people knew the evidence was false.. . Reubart and, at least by implication the prosecutor. Prior to oral argument, Bass called the Panel's attention to the relatively recent case of *United States of America v. Delray Price*, 566 F.3d 900 (9t Cir. Ma 21st, 2009) which although not establishing new law contains an excellent discussion of Supreme Court Decisions (*Brady v. Maryland* 373 U.S. 83 (1963); *Kyles v. Whitley*, 514 U.S. 419(1995); *Giglio v. United States*, 405 U.S.
150 (1972); and *Napue v. Illinois*, 360 U.S. 264 (1959) as to the failure to preserve/disclose exculpatory evidence and/or presenting /failing to correct false and misleading testimony and evidence. The Court notes:

"[E]xculpatory evidence cannot be kept out of th hands of the defense just because the prosecutor does not have it, where an investigating agency does. That would undermine *Brady* by allowing the investigating agency to prevent production by keeping a report out of the prosecutor's hands until the agency decided the prosecutor ought to have it. . ." *Blanco*, 392 F.3d at 388 (quoting *United States v. Zuno-Arce*,
44 F.3d 1420, 1427 (9th Cir. 1995((. Moreover, as we have previously held:

> actual awareness (or lack thereof) of exculpatory evidence in the government's hands,. . . .is not determinative of the prosecution's disclosure's obligations Rather, the prosecution has a *duty to learn*
>
> of any exculpatory evidence known to others acting on
>
> the government's behalf. Because the prosecution is in
>
> a unique position to obtain information known to other agents of the government, *it may not be excused from disclosing what it does not know but could have learned.*

Carriger v. Stewart, 132 F.3d 463, 479-80 (9th Cir. 1997)(enbanc)
(citations omitted) emphasis added)." @909

Prosecutor Hafen has been repeatedly asked when he first knew the prescription bottle and contents destroyed by Burney wee not provided Gina Micali on October 4th, 2005 He has never answered that question More importantly he has never denied that the testimony and records of Burney advising the jury the destroyed bottle was provided Micali on October 4th was false. The

State's position has been that it doesn't make any difference. Bass does not believe the Panel's Order was intended to confirm that conclusion.

The State cannot change its theory and argument to fit the true facts. It's now stuck with the evidence and argument given to the jury and the instructions it presented to the Court including the somewhat convoluted instruction No. 5 (X-2075).

d). The Trial Judge Adopted the False Evidence. To further assure that the jury would believe and rely on the incorrect fact that the bottle depicted in Ms. Burney's illegible photograph was delivered on October 4th, the Trial Judge told Bass. . ."It I from your visit to her two days earlier" (V-IX-1876 and 1877). One doesn't have to be a rocket scientist to conclude that if someone takes 51 pills of hydrocodone (or anything) in one day when the prescription is 4 a day, there are likely to be adverse consequences.

SECOND ISSUE – The Statutory Scheme is Unconstitutionally Vague

This Court approves Instruction No. 12 (OA4) which is a composite of NRS 453.321 and the regulatory provisions of NRS 453.231 and NRS 453.232. That Instruction provides:

"Pursuant to Nevada Revised Chapter 453.321(1)(4), it is unlawful for a medical doctor to sell, supply, dispense or transport or attempt to sell, supply, dispense or transport prescription drugs containing a schedule III (three) controlled substance if that medical doctor has not been issued a dispensing certificate pursuant to the Nevada Board of Pharmacy regulations or

has failed to renew the dispensing certificate pursuant to Nevada Board of Pharmacy regulations."
(Emphasis added)

This instruction not only substitutes medical doctor for "person" but it deletes those provisions of NRS 453.321(1)which can be performed b a medical doctor. This may be consistent with the State's theory of the cased but would not appear to be an accurate reflection of the law.

Bass has pointed out that all 56 of his convictions are based upon the fact that he was found not to have been issued a dispensing certificate. Even though the charges use th word "sale" which may sound more insidious, the actual crime, if any, would be dispensing. Of course, "dispense" is also includd in NRS 453.321(a): "Import, transport, sell, exchange, barter, supply, prescribe, dispense, give away or administer a controlled substance.".

Dispense is defined in NRS 453 056(1):

"1. Except as limited by subsection 2 "dispense" means to deliver a controlled substance to an ultimate user, patient, or research subject by or pursuant to the lawful order of a practitioner, including the prescribing, administering, packaging, labeling or compounding necessary to prepare the substance for that delivery."

It's Bass' belief that the Court misapprehended his constitutional argument. This belief is supported by the fact that the Court did not directly address the regulatory provisions of NRS 453 232 Certainly a medical doctor is a

"person" as used in 453.321 and 453.232, but that can't mean the same thing since only a limited number of individuals qualify for registration to dispense. See **"Practitioner" defined** NRS 453.126 and **"Dispenser" defined** NRS .061/

The reasonable interpretation of NRS 453.321 is that as an all encompassing crime against making available controlled substances; it cannot be intended to include medical doctors. Otherwise terms such as "supply", "prescribe", "give away", or "administer" would become meaningless since this is what a medical doctor does. NRS 453.232 is only applicable in a regulatory sense, and the fact that it is not included in the **offenses and penalties** section of Chapter 453 further supports this position.

As one can see, the interpretation advanced by the State may subject any doctor to murder charges by performing such medical responsibilities as prescribing or administering the controlled substances as there is no clear authorization for them to do so in NRS 453.010-453.552. One of the few authorizations relates to **dispensing** the violation of which contains it own penalty and does not include a standard provision of—"unless a greater penalty is provided elsewhere ". Obviously, the legislature did not intend to subject medical doctors to the penalties of NRS 453.321 (and possible murder charges) when they prescribe or make available controlled substances necessary for their patients' treatment, but that's what they've done. . . .if we adopt the Sate's interpretation. That's exactly what happened to Dr. Bass!!

This Court's Order sets forth cases in determining the constitutionality of a statute (OA5). Consistent therewith

a good summary is found in *Sheriff v. Burdg*, 118 Nev. 853, 857. 59 P3d 484 (2002):

> The doctrine that a statute is void for vagueness is predicated upon its repugnancy to the due process clause of the Fourteenth Amendment to the Untied States Constitution. A statute is void for vagueness if it fails to define the criminal offense with sufficient definiteness that a person of ordinary intelligence cannot understand what conduct is prohibited and if it lacks specific standards, encouraging arbitrary and discriminatory enforcement." [5]

CONCLUSION

The order of Affirmance addresses a number of issues within the discretion of the trial judge or the failure to object context. While this may be true, Bass requests that they be cumulatively analyzed within a fair trial context. He had admittedly unprepared counsel (ineffectiveness aside) and was convicted on false evidence.

Respectfully submitted this 17th day of June, 2010

/s/ R. Paul Sorenson /s/ Alan R. Johns

[5] Bass has his own ideas as to why he was selected as the test case for the State's selected interpretation of the statutory scheme in question. He had long ongoing issues with the Medical Board (his primary nemesis being Dr. Dipak Desai [sic] and a related civil action. However, this may be irrelevant. The issue is the permeating vagueness of the statutory scheme which enabled the state to select him to prosecute. There s no reason such discriminatory and arbitrary enforcement may not befall other doctors.

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 51822 & 53072

Filed: December 9, 2010

HARRISTON LEE BASS, JR
Appellant,

v.

THE STATE OF NEVADA
Respondent.

RESPONDENT'S ANSWER TO PETITION FOR EN BANC RECONSIDERATION

Respondent, through legal counsel CATHERINE CORTEZ MASTO, Attorney General, by CONRAD HAFEN, Chief Deputy Attorney General, pursuant to this Court's order filed November 24, 2010, hereby responds to appellant's Petition for En Banc Reconsideration.

STATEMENT OF THE ISSUE

Pursuant to this Court's order filed November 24, 2010, the only issue for En Banc Reconsideration is whether Appellant's conviction was based on false evidence.

STATEMENT OF FACTS

The State Incorporates by reference herein the statement of facts set forth in Respondent's Answering Briefs previously submitted to the Court.

ARGUMENT

A. BASS HAS FAILED TO MEET HIS BURDEN UNDER NRAP 40 (a)(2)

The State recognizes that an answer will assist the Court to resolve the issue presented in Bass' Petition for En Banc Reconsideration. However, upon review of Bass'

petition, he makes no attempt to show why his en banc petition should be granted. NRAP 40 (a)(2) states:

> The petition shall state briefly and with particularity the points of law or fact that the petitioner believes the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. Any claim that the court has overlooked or misapprehended a material fact shall be supported by a reference to the page of the transcript, appendix or record where the matter is to be found; any claim that the court has overlooked or misapprehended a material question of law or has overlooked, misapplied or failed to consider controlling authority shall be supported by a reference to the page of the brief where petitioner has raised the issue.

Bass' en banc petition relating to the false evidence claim contains the same arguments previously presented by Bass in his brief and oral argument to the three judge panel. These arguments were found by the panel to lack merit and were summarily rejected. When Bass filed a petition for reconsideration the three Judge panel again summarily rejected these arguments.

Furthermore, in the petition now pending before the Court, Bass makes no effort to state with particularity how the three judge panel overlooked or misapprehended any point of law or fact relating to his false evidence claim.

Without more, Bass' petition can not withstand the scrutiny imposed upon him or meet the heavy burden required by NRAP 40 (a)(2). As such, the State urges the Court to reject Bass' petition and affirm the decision by the three judge panel.

B. BASS' CONVICTION IS NOT BASED ON FALSE EVIDENCE

Bass alleges that his conviction is based on false evidence, in support of his argument, Bass contends, wrongfully, that the only evidence relied upon by the State in support of the murder conviction is one bottle of Allscripts prescription drugs found in Gina Micali's house on October 6, 2005.

Bass suggests that because the evidence presented by the State showed he illegally sold the Allscripts prescription bottle to Gina before his October 4, 2005 visit, his conviction is based on false evidence. Based on the evidence presented at trial, Bass' argument lacks merit and is belied by the record on appeal.

1. There was sufficient evidence to convict Bass of second degree murder

In order to convict Bass of second degree murder pursuant to NRS 200.010, 200030 and 453.333, the State was required to prove the following elements beyond a reasonable doubt: (1) the defendant; (2) unlawfully killed a human being; (3) the killing was proximately caused by a controlled substance; and (4) the controlled substance was sold, given traded or otherwise made available to another person in violation of Nevada Revised Chapter 453.

The information charged Bass with having committed the crime of second degree murder between June and October 2005. (AA Vol. III p. 480). At trial, the State's theory regarding this charge was based on the following facts and evidence.

> Bass held himself pit as a licensed medical doctor who made house calls twenty-four hours a day, seven days a week. Bass' business was called DOCS-24-7 and he advertised in the yellow pages as a pain

management specialist. As part of his pain management treatment, Bass sold bottles of prescription drugs to his patients during his house visits. He also wrote prescriptions so his patients could obtain refills at a local pharmacy. (AA Vol. V p. 942 – 1066; Vol. VI p. 1224 - 1275; Vol VIII p. 1593 – 1718; Vol IX p. 1778 – 1877)

Under Nevada law, in order to write a prescription a doctor must have a certificate from the Nevada Board of Pharmacy (Board). However, in order to sell prescription drugs with hydrocodone, a schedule 3 controlled substance, a medical doctor must have a separate certificate from the Board. Bass completed the necessary paper work and obtained a certificate from the Board to write prescriptions. However, he never completed the paper work necessary to obtain a separate certificate authorizing him to sell prescription drugs with hydrocodone. (AA Vol. V p. 1066 – 1109, Vol. VI p. 1129 – 1146; 1146 – 1185)

When Bass started his "house call" practice he began purchasing bottles of prescription drugs from All scripts, a prescription drug wholesaler based out of Chicago Illinois. Allscripts delivered the prescription drugs directly to Bass' house. Bass placed a label with the title Docs 24-7 on each Allscripts Bottle and stored the bottles in his house until they could be sold during his house calls (AA Vol. V p. 942-1066)

When a patient called Bass he would load his car with Allscripts prescription drugs, travelled to the patient's house, examined the patient for about fifteen (15) minutes and then sell them 3-5 bottles of Allscripts prescription drugs. He would also write out a prescription for each drug so the patient could obtain

a refill. (AA Vol. V p. 942 – 1066; Vol. VI p. 1224 – 1275)

Gina Micali was one of bass' patients. Between June and October 2005 , Bass visited Gina's house every sixty (60) days. During each visit he sold her three to five bottles of All scripts prescription drugs and wrote her prescriptions so she could refill the bottles. (AA Vol V p. 942-1066; Vol. 111 p. 1503-1718, Vol. IX (1778-1877).

Bass' last visit to Gina's house was on October 4, 2005. On October 6, 2005, the Clark County Coroner's office dispatched Investigator Amanda Burney (Burney) to Gina's house. Burney examined the body and recovered three prescription bottles. One of the prescription bottles contained 49 pills and was labeled DOCS-24-7. The pills in this bottle were purchased from Allscripts and had, as one of the compound ingredients, the drug hydrocodone. (AA Vol. V p. 942-1066; Vo. VI p. 1306-1339; Vol. III p. 1503-1718; Vol. IX 1778-1877).

Several days after Gina's funeral, Joey Micali, Gina's brother, Joey's wife and Gina's mother went to Gina's house to gather up her possessions. While looking through the house, Joey discovered approximately twelve Allscripts and several other non-All scripts prescription bottles in a drawer of the kitchen hutch. Several of the Allscripts bottles were empty. He confiscated all the bottles and took them home. He later turned the prescription bottles over to the attorney who was representing the family on their wrongful death civil lawsuit. Subsequently, the Allscripts prescription bottles were turned over to the criminal investigator. (AA Vol VI 1340-1349)

Two years later, an investigation into Gina's death was conducted. A search warrant was executed at Bass' residence and a storage facility. The investigators seized

numerous boxes of medical records. All the medical records relating to Gina Micali were introduced at the trial. (AA Vol. V p. 942-1066).

These medical records revealed that Bass had visited Gina from June – October 2005, and had sold her four (4) Allscripts prescription bottles every sixty (60) days. Three of the bottles each contained one hundred pills and the fourth bottle contained ninety pills. Bass also wrote prescriptions for approximately three hundred additional pills during each visit. (AA Vol. V p 942-1066)

These records also showed that on October 4, 2005, Bass visited Gina's house and sold her three Allscripts prescription bottles. The lot numbers on these records matched several of the empty All Jscripts bottles recovered by Joey Micali. The State attempted to introduce the bottles confiscated by Joey Micali as State's exhibit 23, but defense counsel objected during a side br conference. As a result, the State relied upon Bass' medical records to show that he had sold Gina prescription drugs on October 4, 2005. (AA Vol. V p. 942-1066. Vol. S p. 1998-2002)

Bass testified during the trial. He admitted that all the medical records introduced into evidence were records he maintained. He also admitted that he visited Gina on October 4, 2005, and sold her Allscripts prescription pills as reflected in her medical records Vol. III p. 1503-1718, Vol IX 1778-1877).

These facts supported the jury's determination that the State proved each element of the second degree murder charge beyond a reasonable doubt This evidence was uncontradicted and showed the relationship between Bass' illegal sales of and Gina's death and consists of the following.

(1)Bass was the only medical doctor to visit Gina at her home between June and October 2005; (2) Bass was the

only doctor to illegally sell prescription drugs with hydrocodone to Gina; (3) the Allscripts prescription bottles recovered from Gina's house were labeled Docs 24-7; (4) Bass' medical records showed he visited Gina Between June and October 2005 and visited her on October 4, 2005, or two days before Gina was found dead in her home; (5) Bass admitted to the coroner investigator that he was at Gina's house on October 4, 2005, and sold her prescription drugs; and (6) Bass admitted at trial that he visited Fina's house between June and October 2005, sold her prescription drugs with hydrocodone throughout this period and sold her these prescription drugs on October 4, 2005.

Again, these facts are all substantiated by the evidence and testimony presented at trial. This evidence is not false and is corroborated either by Bass' own admissions while testifying at trial or by Gina Micali's medical records. The State submits that this and all the other evidence presented to the jury are sufficient to prove the charge of second degree murder beyond a reasonable doubt and that this court should affirm the decision of the three judge panel.

2. Amanda Burney's testimony was not false evidence.

Contrary to Bass' argument,Burney never testified that she knew for certain that the Allscripts prescription bottle with the label DOCS 24-7 and recovered on October 6, 2005, was the same bottle Bass sold to Gina on October 4, 2005. A closer review of Burney's testimony reveals that she found the bottle and noticed that the label had Bass' name on it .Burney also found paperwork with Bass' name and telephone number. (AA Vo;/ VI p. 1314-1316).

Burney called the telephone number and Bass answered the call. She confirmed that he was Doctor Bass

and asked if he had visited Gina two days earlier. Bass replied that he did visit Gina on October 4, 2005,andtreated her for back pain (AA Vol. VI p. 1314-1316/

Additionally, Bass' argument that this was the only evidence relied upon by the State to convict Bass of the second degree murder charge lacks merit and is belied by the record.

The State previously laid out all the evidence it relied upon to convict Bass of second degree murder Nevertheless, given Bass' continued false assertions this evidence is worth repeating:

> (1)Bass was the only medical doctor to visit Gina at her home between June and October 2005; (2) Bass was the only doctor to illegally sell prescription drugs with hydrocodone to Gina; (3) the Allscripts prescription bottles recovered from Gina's house were labeled DOCS 24-7; (4) Bass' medical records showed he visited Gina between June and October 2005 and visited her on October 4, 2005, or two days before Gina was found dead in home;(5) Bass admitted to the coroner investigator that he was at Gina's house on October 4, 2005,and sold her prescription drugs; and (6) Bass admitted at trial that he visited Gina's house between June and October 2005, sold her prescription drugs with hydrocodone throughout this period and sold her these prescription drugs on October 4, 2005. (AA Vol X p. 1998-2002).

Again, the record on appeal demonstrates that the State never relied on just the one Allscripts prescription

bottle recovered by Burney to convict Bass of second degree murder. As such, Bass 'contention that the State presented false evidence should be rejected again and the decision by the three judge panel should be affirmed.

3. The State's opening statement and closing argument.

Bass points to selected language in the prosecutor's opening statement and closing argument and argues that the State presented false evidence. However, Bass fails to recognize that the jury was instructed that argument by counsel is not evidence and their decision by must be based only on the facts and evidence presented during the trial.(AA Vol.X p. 2092).

Therefore, even if the prosecutor made one statement about how the Allscripts prescription bottle tied into Gina Micali's death,it is presumed the jury followed this instruction and based their decision only on the evidence.

Additionally, when the prosecutor's closing argument is read in its entire context, it is clear that he was urging the jurors to consider all the evidence and not just this one Allscripts prescription bottle to convict Bass of second degree murder lacks merit and should be rejected again by this Court.

CONCLUSION

Based on the arguments presented herein, the State asks this Court to affirm Bass's conviction and dismiss his Petition for En Banc Reconsideration.

DATED this 9th day of December,2010/

CATHERINE CORTEZ MASTO
Attorney General

By:/s/Conrad Hafen

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 51822 and 53072

Filed: February 7, 2011

HARRISTON LEE BASS, JR.,)
)
Appellant,)
vs.)
)
THE STATE OF NEVADA,)
)
Respondent.)
)

MOTION FOR LEAVE TO FILE A RESPONSE TO RESPONDENT'S ANSWER TO PETITION FOR EN BANC RECONSIDERATION; AND, IF GRANTED, FOR RELATED RELIEF.

COMES NOW, HARRISTON LEE BASS, JR., Appellant and moves the Court for LEAVE TO FILE A REPLY TO RESPONDENT'S ANSWER TO PETITION FOR EN BANC RECONSIDERATION; AND, IF GRANTED, FOR RELATED RELIEF.

These Motions are precipitated and felt necessary as a result of Respondent's Answer directed by this Court and are supported by the following Points and Authorities.

STATUS OF APPEAL AND AUTHORITY FOR INSTANT MOTIONS

On May 18th, 2010 (following oral argument in December, 2009) the assigned Panel of this Court entered an Order of Affirmance. Appellant timely filed a Motion for Re-Hearing which was denied September 28th, 2010. Appellant next filed a Petition for En Banc

Reconsideration. While Bass disagreed with many of the Panel's findings, consistent with the standards of NRAP 40 A (a) his Petition was limited to two issues: (i) the conviction was based upon false evidence, and (ii) the statutory scheme pursuant to which he was convicted is unconstitutionally vague and indefinite.

On November 24th, 2010, this Court entered an Order directing Respondent to Answer the Petition for En Banc Reconsideration. The Order directed that said Answer be limited to the issue of "whether the conviction was based on false evidence." Respondent's Answer was electronically filed on December 9th, 2010. No Reply to said Answer was requested by the Court (40 A (e)). On January 20th, 2011, the Court determined that en banc consideration was not warranted and ordered the Petition denied.

On February 4th, 2011 Bass submitted for electronic filing a motion designated as MOTION FOR REHEARING OF THE ORDER DENYING EN BANC RECONSIDERATION. This attempted filing was rejected by the Clerk as not authorized pursuant to NRAP. While it is correct that NRAP 40A does not address rehearing of an en banc decision, NRAP 40(b)(2) specifically refers to . . . "rehearing of an en banc decision,. . .".

The instant Motion is therefore brought pursuant to NRAP 27(a) covering applications for relief in general. This Court still has jurisdiction of the matter and Appellant's requested relief is the same regardless of its semantic designation.

ARGUMENT

A Reply to Respondent's Answer will establish the validity of Appellant's false evidence argument. Bass will briefly address several of the more important issues that will be covered in a Reply.

Necessarily, these would be the same issues addressed in a Motion to Rehear the Order Denying En Banc Reconsideration.

The Elements of the Crime

Introductorily Respondent attempts to identify the elements of the offense as follows:

"In order to convict Bass of second degree murder pursuant to NRS 200.010, 200.030 and 453.333, the State was required to prove the following elements beyond a reasonable doubt (1) the defendant; (2) unlawfully killed a human being; (3) the killing was proximately caused by a controlled substance; and (4) the controlled substance was sold, given, traded or otherwise made
available to another person in violation of Nevada Revised Chapter 453." This sounds good, but Respondent neglects to reference the actual jury instruction which it presented to the Court and was given.

INSTRUCTION NO. 5

In order to find the Defendant Guilty of Second Degree Murder (Sale of a Controlled Substance Causing Death), the State must prove each of the following elements beyond a reasonable doubt:

1 That on or about October 4-6, 2005, in Clark County, Nevada;

2 The Defendant unlawfully;

3 Killed a human being;

4 The death was proximately caused by a controlled substance;

5 The controlled substance was sold, given, traded or otherwise made available to the victim by the defendant;

6 In violation of Nevada Revised Chapter 453."

(Emphasis added) (X-2075)

Bass has previously discussed the disjointed syntax of this Instruction and continues to submit that there is no other reasonable interpretation than that the controlled substance proximately causing the death be provided the victim (in violation of Chapter 453) on or about October 4-6, 2005. Bass was found guilty by jury verdict. The issue is what the jury was instructed and what evidence and arguments presented to them. Bass has cited on numerous occasions the prosecutor's opening (IV-905-906) and closing (X-2001-2002) statements, the testimony of Amanda Burney (VI-1323-1324 & SA-II-232-233), and even the trial court's question/statement to Dr. Bass: " It is from your visit two days earlier." (IX-1876). Respondent's Answer attempts to divert the Court's attention from the fact that the evidence which suggests that the one-half full bottle of hydrocodone destroyed by Burney was provided Gina Micali on October 4th by Dr. Bass and caused her death was false.

Prosecutor's Erroneous or False Statements

Most disingenuous of all is the prosecutor's contention that since the Court instructed the jury that argument of counsel is not evidence, no matter what he said (false or misleading) is okay. That's not the law or consistent with the prosecutor's legal or ethical duty. *McKee v. State*, 112 Nev. 642, 917 P.2d 940 (1996). The reality is that the Allscript prescription bottle recovered (and then destroyed by Burney) was all they had.

The State's Answer is Inconsistent with the Panel's Decision

Moreover, the State's present effort to downplay the false evidence as its theory and the basis for the

conviction is inconsistent with the findings in the Panel's Order of Affirmance:

"Bass has made no showing that the State's actions affected his substantial rights by causing prejudice. The State's theory that Micali died from hydrocodone that she bought from Bass on October 4, 2005, was supported by the evidence. Specifically, Detective Reubart testified that Bass sold Micali three bottles of Lorcet on October 4, 2005. The State also introduced Investigator Burney's medication receipt that indicated that the half-full bottle of hydrocodone she found in Micali's residence had been sold on October 4, 2005. Therefore, we conclude Bass has failed to demonstrate how the State's theory of the cause of death affected his substantial rights." (Pages 14 – 15) (Emphasis Added)

The False Evidence Issue Relates to the Murder Conviction

One area which could be more thoroughly addressed in a Reply is that the bulk of Respondent's Answer deals generally with Dr. Bass' practice and procedure as an on-call doctor over a period of time. The false evidence issue does not relate to the other 55 counts of the Indictment -Information but only the murder charge. As per the Court's instruction the date of a violation of Chapter 453 proximately causing Gina Micali's death would have to be October 4th, 2005. The Court's first Instruction to the jury was that their verdict had to be based on the law as given by the Court (X-2048).

Appellant's Investigator's Report

Appellant recognizes that this Sworn Statement re: Materially False Evidence authored by Investigator Ninalynne Bills is not part of the record on appeal and refers to documents and materials not in the record at least in a complete form This Court was (is) obviously

interested in the false evidence issue, and Bass believes the investigator's statement is sufficiently related to be relevant. A copy is attached for review if the Court deems it appropriate.

Respondent's Answer asserts that Bass was the only medical doctor visiting Gina Micali or selling her prescription drugs. Investigator Bills' report addresses that question and also relates to the Imitrex issue. Imitrex was identified in Amanda Burney's report. It appears that contrary to the State's representations and evidence introduced at trial, Gina Micali was regularly (on a monthly basis) receiving and filling prescriptions for Imitrex from another doctor.

RELATED RELIEF

Clearly, if this Court allows Bass to Reply to Respondent' Answer (or allows the presently rejected filing of a Motion for Rehearing), it will be necessary to stay any remittitur until the final disposition of all matters. See Ronning v. State, 116 Nev. 32, 992 P.2d 260 (2000) footnote 2 as to directing a filing of a previously rejected pleading.

CONCLUSION

The State continues to suggest that it had other evidence (or other theories) to convict Dr. Bass of murder without the half full hydrocodone bottle. However, the prosecutor, all of his witnesses, and even the trial judge, (mistakenly, erroneously, or falsely) advocated that this bottle was delivered to the victim by Dr. Bass on October 4th, 2005. The prosecutor still has not acknowledged whether or when he knew this was false and why he failed to do anything about it. It was the State's witness who destroyed the bottles and took illegible photos of them. It

was the State's witness who took possession of all[1] of the October 4th bottles from personal injury attorney Ed Bernstein. It was the State's witnesses who seized all Dr. Bass' original medical records which reflected the identification numbers of all prescription bottles. It is not arguable that the evidence, innuendos, and argument presented to the jury were false.

DATED this 7th day of February, 2011

Respectfully Submitted

/s/ Alan R. Johns

SWORN STATEMENT OF NINALYNNE BILLS

RE: MATERIALLY FALSE EVIDENCE

The undersigned makes the following sworn statement under the law of perjury of the State of Nevada

1. I was retained by R. Paul Sorenson to conduct an investigation into the prosecution of Harriston L. Bass, Jr. in the Case currently on appeal before this Court inn the above-entitled cases. Attached hereto is a copy of my Curriculum Vitae reflecting my knowledge and qualifications as an Investigator.
2. I have been given a complete copy of all the records before the Justice Court, District Courrt, and the supreme Court. In addition, I have been given authority to investigate the conduct of the

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[1] The State's Answer uses the word "several" rather than "all". This persistence in clinging to the delusion that the one half full bottle was delivered October 4th, 2005 is inexplicable. The prosecutor's primary investigator opened Exhibit 12, identified the bottles, and counted the pills (XI 2220-2240), "all" of the October 4th bottles were accounted for.

defense (Appellate), its witnesses as well as the prosecution (Respondent) and its witnesses without limitation and have been given the complete cooperation of the defense in this investigation.

3. That based upon my investigation and review of the complete record., I believe that the Supreme Court should be made aware of the fact that there are other material falsifications of evidence by the prosecution than are covered in the En Banc Petition filed by Dr. Bass and the Respondent's Answer to the Supreme Court's Order.
4. It is my opinion that the information is of such significance that it is necessary to inform the Court immediately of this evidence as it represents additional material falsification utilized to obtain the conviction against Dr. Bass.
5. The investigation I have conducted thus far has included a review of the pharmacy service known as Allscripts and is set forth below.
   A. Allscripts is a duly licensed Nevada Wholesale Pharmacy that was specifically licensed by the State of Nevada with the knowledge that it was to provide medical doctors with Standard Sealed Prescriptions so that they could safely, lawfully and professionally dispense standard medications to their patients at the time of their visit with the Doctor, eliminating the need for a prescription and saving a trip to the pharmacy by their patients.

B. Allscripts was required to verify that each of its customers, including Dr. Bass, was properly registered with the Nevada Board of Pharmacy to both write prescriptions and too have obtained a separate registration if the Doctor wanted to dispense the same prescription before any prescriptions were provided to that Doctor. (It is my understanding that Dr. Bass believed he was in compliance with said law since 1986. His 1988 renewal application stated he was allowed to prescribe, administer or dispense.) To the best of my knowledge and information, Allscripts did not understand this requirement, so this verification was not done until just prior to the time of Dr. Bass's arrest. (Information of this violation by ALLSCRIPTS was not disclosed to the defense or the jury.)

C. In the event Allscripts had fulfilled their duties and advised Dr. Bass he could have simply requested the State of Nevada Board of Pharmacy to correct its records or file a new applicaton. (Information of this was also withheld from the defense and the jury.) The defense is continuing the investigation of the disappearance of the original 1986 application of Dr. Bass, which was and is missing from the Board's records.

D. The Board of Pharmacy investigated all Nevada Customers of Allscripts that were medical doctors or other professional

providers. Allscripts readily admitted to the Board of Pharmacy that it did not verify the required "dispensing" license on any of the doctor's names they provided to the Nevada Board of Pharmacy. (This investigation and its results were withheld from he defense and jury.)

E. There are more licensed wholesale pharmacies in Nevada than Allscripts and no information was provided the defense or the jury as to ANY studies done regarding these other wholesale pharmacies and their customers. (The defense investigation continues.)

6. Medical information about about Gina Micali was withheld from the defense and the jury. Of particular importance, the defense asked the prosecution for assistance in obtaining a complete medical record of Gina Micali and in particular the evidence that the prosecutor had about her prescription drug use, abuse and any use of illegal drugs. (We have uncovered some of the false information that was given to the jury and defense with regard to the use of Imitrex (not provided or prescribed by Dr. Bass) which Dr. Bass and his medical expert believe was the probable cause of Ms. Micali's Death.)

7. Of particular interest, the Prosecutor, in his answer to this court stated a half truth for the proposition that Bass was the only doctor treating Ms. Micali. (In actuality she was seeing another doctor, time and place as yet unknown, as she was having Imitrex prescriptions filled regularly during the same period she was seeing Dr.

Bass, which was a violation of a contract that he has with all of his patients.) The information about her use of Imitrex was completely covered up It was obvious the Board of Medical Examiners was aware of some problem with Gina Micah because they contacted the Doctor who was writing the Imitrex prescriptions. That doctor told the Board in writing that he hadn't seen Ms.Micah since 2001. The records of the Board of Pharmacy, used during the trial, did not show all of Gina Micah's use of prescription medicines including Imitrex, by pharmacies

and were therefore, incomplete. The jury did not have a total picture of Gina Micah's prescription drug use, rather a one-sided one.

DATED this 3rd day of February, 2011

/s/Ninalynne Bills

NINALYNNE BILLS

Curriculum Vitae

Employment History/Experience

1985-2004

From 1985 to 2004 I was employed as a Special Agent in the Federal Bureau of Investigation (FBI) I have conducted investigations in al areas of FBI jurisdiction, with the exception of White Collar Crime classifications As part of my duties I participated in two undercover investigations, the first in New

Orleans, targeting drugs, Organized Crime and Police Corruption, lasting eighteen months and the second consisting of an espionage undercover targeting first the Soviet Union, then Russia, which involved five years work and required me to become fluent in Russian. In Las Vegas, I covered a variety of assignments including espionage, security, presidential background investigations, the Special Operations Group and the Evidence Response Team (ERT) The ERT assignment took approximately five years and was something to which federal crime scenes within our jurisdiction and assisted in nationwide cases such as 9/11, in which I was a participant I personally was a death scene investigator on an Indian Reservation As the Security Officer for the Division, I also handled security concerns for Hoover Dam, the facilities at the Nevada Test Site and other areas of high national interest

Education/Experience

Utah State University, majoring in Political Science and Administration, minor in Sociology

Attended 1979 to 1982 and was awarded a Bachelor of Science Degree.

(I carried a scholarship based on grades all through college)

J Reuben Clark School of Law at Brigham Young University Attended 1982 to 1985 and was awarded a Juris Doctorate Degree. In my second year, I was a member of the National Moot Court Team and in my third year was a member of the Moot Court Board I became a member of the Utah Bar in 1986 (inactive since 1992 (and a Member of the Bar of the Supreme Court of the United States in 1990 (inactive since 1992)

As soon as I completed the Bar Examination in August of 1985, I had three days to prepare to attend the FBI Academy in Quantico, Virginia. I spent four months being trained in law, investigations, crime scenes, firearms, defensive tactics and interrogation techniques. That was the first of many trips to Quantico for training.

From August 1989 to February 1991, I was trained at the Foreign Service Institute five days a week to learn the Russian language as a requirement for keeping a job upon arrival at my new duty station. The undercover was supposed to terminate in eighteen months, but my commitment was extended to five years.

DISTRICT COURT
CLARK COUNTY, NEVADA
Case No. C 229628
Dept. V

STATE OF NEVADA,)
Plaintiff,)
vs.)
HARRISTON L. BASS, JR.,)
Defendant.)
)

EXCERPT OF REPORTER'S TRANSCRIPT OF PROCEEDINGS
THURSDAY, JANUARY 3, 2008

Before the Hon. Stewart L. Bell, District Judge (oral decision on All Pending Motions)

THE COURT:

This is Defendant's motion to continue and motion to compel. I actually went down and talked to Judge Glass about that to see what her position was, and she says she is not prepared to continue this trial date. It's been continued a number of times. Mr. Phillips needs to be prepared, and she expects it to go forward.

MR. HAFEN: That's correct, Your Honor.

THE COURT: I don't have any part in this decision other than I'm the messenger.

(End of Partial Transcript)

DISTRICT COURT
CLARK COUNTY, NEVADA
Case No. C229628
Dept. V.

STATE OF NEVADA,)
)
Plaintiff,)
vs.)
)
HARRISTON L BASS, JR.,)
)
Defendant.)
)

EXCERPT OF REPORTER'S
TRANSCRIPT OF PROCEEDINGS,
Monday, February 25, 2008
Reporter's Transcript of Hearing Re: Jury Trial
Day 1
Before the Hon Jackie Glass, District Court Judge

. . . .

MR. PHILLIPS: Your Honor, here's a—a problem that we have. We—over the weeks—the last couple of weeks we've been trying to put together all of my client's records that—the ones that have been returned, but his computer has been erased, various documents that have been just thrown together. We've been trying to put everything in order that they were. It's a tremendous heap of papers that we can't get through and we need that to defend—

THE COURT. Mr. Phillips—

MR. PHILLIPS: --my client.

THE COURT: --we're going to trial today. We are not putting off this trial again. We have put all this trial too long and today's the day we're going to trial.

MR. PHILLIPS: Then I need to state for the record emphatically that we're not prepared to go forward today.

THE COURT: There has been a consorted effort by the defense to avoid having this case go to trial. This case is going to trial today.

MR. PHILLIPS: And I need to make the record that defense has not made any—to my knowledge, any concerted effort to not go to trial. We just want to go to trial properly and prepared.

THE COURT: Mr. Phillips, you'll never be prepared for this at the way this has been going. So you've tried to continue this. You've tried to recuse me. You've tried to bring in counsel in an effort to recuse me. You've caused all kinds of delays. Today is the day, and I told you this. This has been pending for a significant period of time and today is the day we're going to trial.

MR. PHILLIPS: And so the Court's that we tried to recuse—so the Court know, we believe that we did have grounds for recusal. We stand by that.
THE COURT: Great.
MR. PHILLIPS: So far as any other attempts, anything that we filed with the Court we truly

believed that we had a basis for it. In fact, just recently—in fact, just over the weekend we filed a motion to dismiss.
THE COURT: Right. And it's not been filed.
MR. PHILLIPS: It's been filed, Judge, I have—
THE COURT: Well, it's not timely. It's not noticed and it's not being heard.
MR. PHILLIPS: So the Court's going to deny our motion to dismiss?
THE COURT: Absolutely I am.
MR. PHILLIPS: Okay.

(End of Partial Transcript)

Supreme Court, U.S.
FILED
MAY 25 2011
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No. 10-1301

In the Supreme Court of the United States

HARRISTON LEE BASS, JR.,
Petitioner,

v.

STATE OF NEVADA
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Nevada

BRIEF IN OPPOSITION

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NRS 453.321 4

NRS 453.333 4

NRS 453.552 4

FACTS

The state supreme court in its Order affirming the conviction of Dr. Harriston Lee Bass, Jr. ("Bass") set forth the facts of his case as follows. A jury convicted Dr. Harriston Lee Bass, Jr. of second-degree murder for selling a controlled substance that caused Gina Micali's death, 49 counts of selling a controlled substance, and 6 counts of possession of a controlled substance for the purpose of sale. After trial, a bag of prescription medications, which had been the State's proposed Exhibit 12, was examined and opened by both parties at Attorney Edward Bernstien's office who was handling a wrongful death suit related to this proceeding. Because the bag allegedly contained all of the medications that Bass dispensed and sold to Micali on October 4, 2005, he moved for a new trial or dismissal based on newly-discovered evidence, arguing that the State's theory that Micali died from medication Bass dispensed and sold to her on October 4 was no longer viable.

The state high court identified the issues before it on appeal as follows: (1) several jury instructions were erroneous; (2) the statutes under which he was charged and convicted are unconstitutionally vague; (3) three of the counts of which he was convicted are redundant; (4) the State's failure to preserve and collect evidence denied him due process; (5) the district court abused its discretion when it allowed testimony about a financial analysis regarding the prescription drugs he sold; (6) he was prejudiced by judicial misconduct; (7) the district court abused its discretion when it denied his motion to continue the trial; (8) the prosecutor had a conflict of interest; (9) he was prejudiced by prosecutorial misconduct; (10) the State

failed to present sufficient evidence to support his conviction of selling controlled substances to Samuel Baker; (11) his sentencing was based on inadmissible, false, and inflammatory evidence; and (12) the district court abused its discretion when it denied his motion for a new trial or dismissal based upon newly discovered evidence.

ARGUMENT

QUESTION 1.

To the extent that Bass claims that his counsel was ineffective, he is improperly raising a collateral claim on direct review. In n.4 of its Order of Affirmance the state high court stated:

> We note that Bass argues that he received ineffective assistance of counsel. This issue, however is not appropriate on direct appeal. See *Corbin v. State*, 111 Nev. 378, 381, 892 P.2d 580, 582 (1995) ([T]his court has consistently concluded that it will not entertain claims of ineffective assistance of counsel on direct appeal.")

The state high court refused to hear this claim because it was improperly brought before it. Bass cannot raise a claim of ineffective assistance of counsel on direct review.

To the extent that Bass is arguing that, when the state district court denied his motion to continue, the state district court forced him to go to trial when his attorney was unprepared and **the district court** thereby deprived him of the right to counsel, this claim

is raised for the first time on appeal. In Question 1, Bass contends that he "was denied his right to counsel by being forced to trial when his attorney was admittedly unprepared." Bass failed to raise this federal question before the state courts. In his direct-appeal Opening Brief, Bass only argued the federal claim that his trial counsel was ineffective because he wasn't prepared to proceed, as the following statements from his appellate brief show: 1) his claim or Issue No. 1 was titled "Unprepared or Ineffective Assistance of Counsel"; 2) he argued that "[E]ven the best attorney can't be effective if he's unprepared"; and 3) he cites to *Strickland v. Washington*, 466 U.S. 668 (1984), to support his argument that his trial counsel was ineffective because he was unprepared. If Bass is alleging that the state district court deprived him of the right to counsel when it denied his motion for a continuance and forced him to go to trial when his counsel was unprepared, he is improperly raising this claim for the first time in the Supreme Court.

Further evidence that Bass did not raise the above federal question in the state courts is found in the fact that he only appealed the district court's denial of the request for a continuance as an abuse of discretion under state law, *i.e.*, NRS 174.511 and NRS 174.515; Bass raised no federal claim related to the continuance. Bass' request for the continuance was based on his allegation that counsel hadn't had time to re-organize the documents the State had provided. The state supreme court, applying state law, found that the documents had been available to the defense for eight months, and further found that the claim had no merit because Bass had failed to show he was prejudiced by the district court's denial of the motion. Although Bass argued below under NRS 174.511 and NRS

174.515 that the district court abused its discretion when it denied his motion for a continuance, he never argued below that the district court deprived him of his right to counsel when it denied the motion to continue.

QUESTION 2.

In Question 2, Bass argues that "the Nevada statutory scheme pursuant to which Dr. Bass was prosecuted and convicted of murder" was unconstitutionally vague and indefinite. NRS 200.010 is not unconstitutionally vague because it clearly puts an ordinary person on notice that if he sells a controlled substance in violation of Chapter 453 of the Nevada Revised Statutes, and that controlled substance causes another's death, he commits murder. NRS 453.321 clearly provides that, except as authorized by the provisions of NRS 453.011 to 453.552, inclusive, a person who sells or dispenses a controlled substance commits a felony. Bass was not authorized or licensed to dispense or sell controlled substances, only to prescribe them. NRS 453.333 clearly puts an ordinary person on notice that he commits murder if, in violation of NRS Chapter 453, he sells or makes available a controlled substance which proximately causes the death of another. Bass' quote of NRS 453.333 contains a typographical error; he omitted the bolded portion below; said statute provides in pertinent part as follows:

> If the death of a person is proximately caused by a controlled substance which was sold, given, traded or otherwise made available to him . . . by another person **in violation of this chapter, the person** who sold, gave or traded

> or otherwise made the substance available to him. . . is guilty of murder.

In sum, Dr. Bass unlawfully sold a controlled substance which proximately caused Gina Micali's death. The statutes under which he was convicted are not constitutionally vague.

QUESTION 3.

In Question 3, Bass makes two arguments: 1) his conviction was based upon the introduction and advocacy of false evidence; and 2) prosecutorial misconduct amounted to a *Brady* violation. Both allegations hinge upon what Bass terms as the "newly-discovered" evidence in proposed trial Exhibit 12.

The first part of Question 3 fails to state a federal claim. At page 2 of his petition for writ of certiorari, Bass states that his third (false evidence) question primarily involves due process considerations, but in Question 3 itself, he does not allege a constitutional violation. Although he raised due process claims in the state courts, these claims only pertained to Investigator Amanda Burney's failure to preserve and collect the prescription bottles and the pills therein which she found at the victim's residence, and the victim's blood sample. Bass raised no other due process violations below in the state courts.

Should the first part of Question 3 raise a federal claim, Bass' claim, that "the prosecution's entire theory was that the hydrocodone which caused Gina Micali's death was dispensed by Dr. Bass two days earlier," has no merit. The criminal information charged Bass with having committed the crime of

second degree murder between June 2005 and October 2005. The State's theory regarding this charge was based on the following facts and evidence. Bass held himself out as a licensed medical doctor who made house calls twenty-four hours a day, seven days a week. Bass' business was called DOCS-24-7; he advertised in the yellow pages as a pain management specialist. Although Bass was licensed to prescribe drugs containing hydrocodone, he was not licensed to dispense or sell them. Bass' medical records revealed that Bass had visited Gina Micali from June to October 2005, and had sold her four (4) Allscripts prescription bottles every sixty (60) days. Three of the bottles each contained one hundred pills and the fourth bottle contained ninety pills. Bass also wrote prescriptions for approximately three hundred additional pills during each visit. Bass' records also showed that on October 4, 2005, two days before Gina was found dead in her home, Bass visited Gina's house and sold her three Allscripts prescription bottles. The lot numbers on these records matched several of the empty Allscripts bottles recovered by Joey Micali. The State attempted at trial to introduce the bottles confiscated by Joey Micali as State's Exhibit 12, but defense counsel objected during a side bar conference. As a result, the State relied upon Bass' medical records to show that he had sold Gina prescription drugs on October 4, 2005. Bass testified during the trial. He admitted that all the medical records introduced into evidence were records he maintained. He also admitted that he visited Gina on October 4, 2005, and sold her Allscripts prescription pills as reflected in her medical records. Bass was the only medical doctor to visit Gina at her home between June and October 2005. Bass was the only doctor to illegally sell prescription drugs with hydrocodone to Gina. The

Allscripts prescription bottles recovered from Gina's house were labeled DOCS 24-7. Bass admitted at trial that he visited Gina's house between June and October 2005, sold her prescription drugs with hydrocodone throughout this period and sold her these prescription drugs on October 4, 2005. Contrary to Bass' argument, Amanda Burney never testified that she knew for certain that the Allscripts prescription bottle with the label DOCS 24-7 and recovered on October 6, 2005, was the same bottle Bass sold to Gina on October 4, 2005. This evidence is not false and is corroborated either by Bass' own admissions while testifying at trial or by Gina Micali's medical records.

In his second argument, Bass makes a vague prosecutorial misconduct (*Brady* violation) claim. He appears to claim a *Brady* violation related to Exhibit 12, when not only did he know about the evidence in Exhibit 12, he objected to its admissibility. Preliminary-hearing proposed Exhibit 13 and proposed trial Exhibit 12 were the same item: three bottles of Xanax and five bottles of Norco which the victim's brother, Joey Micali, had taken out of the victim's home a few days after her death. Bass knew about this evidence before trial. During the preliminary hearing the prosecutor attempted to admit said prescription bottles but the defense successfully objected. Also during the preliminary hearing the prosecutor provided Bass with a document that indicated that the victim's brother Joey told Detective Reubart that he had given attorney Gary Call the prescription bottles Joey had retrieved from the victim's home. The prosecutor also provided Bass with a letter from Call to Reubart stating that Call had turned over eight Allscripts bottles to Reubart. During trial, leading up to the State's attempt to introduce

proposed Exhibit 12, the victim's brother testified he had put the prescription bottles he retrieved from his sister's home in a brown bag; the court sustained Bass' objection and did not admit Exhibit 12 as evidence. There was no *Brady* violation or prosecutorial misconduct.

CONCLUSION

The Court should deny Bass' Petition for Writ of Certiorari because he has failed to present any compelling reason for the Court to hear his claims. His collateral claim of ineffective assistance of counsel cannot be raised on direct review. To the extent Bass argues that the district court denied him the right to counsel, he failed to raise this federal claim in the state courts. The Nevada statutory scheme under which Bass was prosecuted and convicted is not constitutionally vague because it clearly puts an ordinary person on notice that he commits murder if, in violation of NRS Chapter 453, he sells or makes available a controlled substance which proximately causes the death of another. Bass' argument that his conviction was based upon the introduction and advocacy of false evidence fails to state a federal claim because it alleges no constitutional violation. The prosecution's theory was based not only upon Bass' unlawfully dispensing medication to the victim two days before her death, but also upon Bass' visiting the victim every sixty (60) days from June 2005 to October 2005 and during each of said sixty-day visits 1) dispensing four (4) Allscripts prescription bottles which contained a total of three hundred and ninety (390) pills and 2) writing prescriptions for approximately an additional three hundred (300) pills. Bass' vague prosecutorial-misconduct (*Brady* violation)

claim related to proposed trial Exhibit 12 has no merit because not only did Bass know about the evidence in proposed Exhibit 12, he objected to its admissibility of its contents and prevented them from being admitted at the preliminary hearing and at trial. Bass' asserted errors consist of erroneous factual findings or the misapplication of a properly stated rule of law. The Court should deny his Petition for Writ of Certiorari.

DATED this 25th day of May, 2011.

Respectfully Submitted,

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189 (3)

No.: 10-1301

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

HARRISTON L. BASS, JR., Petitioner
-vs-
THE STATE OF NEVADA, Respondent

On Petitioner for Writ of Certiorari
To The Supreme Court of the State of Nevada

Reply to Respondent's Brief in Opposition

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

This Reply is submitted pursuant to Supreme Court Rule 15 (6) and is believed necessary to point out certain oversights "perceived mis-statements" presented in Respondent's Opposition. These may appropriately be considered "new points raised in a brief in opposition, . . .".

1. FACTS

Petitioner "Bass" has selectively presented to this Court only three issues which, although interrelated among themselves and other non-presented issues, are considered to have the most significant constitutional import.

Respondent's Statement of Facts purports to identify Bass' State-Appeal Issues by essentially quoting from the Nevada Supreme Court's Order of Affirmance (Appendix "A" 13-30 at 14). Said Court lists twelve issues which it believes Bass is arguing. In fact, the underlying appellate proceedings, the basis for this Writ, consisted of two consolidated appeals (No. 51822 and No. 53072). The first appeal presented thirteen issues and the second appeal seven. The first issue in Case No. 51822 was unprepared or ineffective assistance of trial counsel. Ineffective (unpreparedness) of trial counsel was also identified as an issue in No. 53072. While the Nevada Supreme Court may have omitted or chosen not to address this issue, it is entirely inaccurate to suggest that Dr. Bass didn't raise it and is now raising it for the first time.

ARGUMENT

Question 1.

It is correct that the Nevada Supreme Court's Order of Affirmance (Appendix "A" 13-30 @ 30 ftn. 4) delegated Bass' ineffective assistance of counsel VI Amendment right (*Strickland v. Washington*, 446 U.S. 668 (1984) to a footnote. Interestingly the Order of Affirmance did not hesitate to point out infirmities in counsel's performance i.e. failure to object, failure to discover exculpatory evidence, etc. as related to other issues in his appeal. However, the Court declined to address them in a Sixth Amendment context at that time.

It should also be pointed out that Bass' second consolidated appeal arose from a Motion for New Trial Based on Newly Discovered Evidence which specifically raised the ineffective assistance of counsel claim. This was before the same trial judge who said his counsel would never be prepared and who witnessed said counsel's trial performance.

In the Order Denying Defendant's Motion for a New Trial (A-3-10), the trial judge finds the evidence in question was not newly discovered since Defendant (his counsel) knew or should have (through reasonable diligence) of the existence and import of said evidence.

While the denial of a Motion to Continue may be a matter of discretion, the constitutional right to effective assistance of counsel is not. When trial counsel candidly admitted he was unprepared the judge made no inquiry as to why or how much time was needed. More importantly she made no inquiry to Dr. Bass as to whether he was aware of his counsel's unpreparedness and was ready or willing to proceed.

The Sixth Amendment right to counsel is arguably the most important of an accused's constitutional guarantees. Other rights (impartial jury, confrontation, right to testify, etc.) are generally closely scrutinized by the Court and inquired into at the time. The Nevada rule appears to postpone this inquiry until well after the damage has been done.

Question 2.

In addressing the constitutionality of the statutory scheme, it is interesting to note that Respondent omits any discussion of NRS 453.226-232. The reason Bass uses the phrase "statutory scheme" is that there is no single complete statutory definition of the murder charge of which he was convicted. What we have is a pyramid of statutes: NRS 200.010 **Murder**, NRS 453.333 **Penalties for making available controlled substance which causes death**, NRS 453.321 **Offer, attempt, or commission of unauthorized act relating to controlled or counterfeit substances** . . ., and finally NRS 453.232 **Penalty for failure to register**. NRS 453.232 is in the regulatory (not the offenses and penalties) section of Chapter 453 and constitutes Dr. Bass' only alleged violation.

NRS 453.332 "requires a violation of this chapter and NRS 453.321 provides "Except as authorized by the provisions of (this chapter)."

All we have then is strict liability for a medical doctor who unknowingly, negligently, or intentionally was not considered by the Board of Pharmacy to be properly registered. There is no element of *mens rea*. *Morissette v. United States*, 342 U.S. 246 (1952). It is small wonder then that Respondent's

Opposition does not discuss the regulatory registration provisions NRS 453.226, 231, and 232. Moreover those provisions were also not addressed in the Nevada Supreme Court's Order of Affirmance.

Question 3

Was Dr. Bass' conviction based on the introduction and advocacy of false evidence?

The State's Opposition again avoids answering the question of when it (the prosecution and investigative agents) knew that the evidence they introduced and argued was false. While their unwillingness to do so may be understandable, the fact remains that Dr. Bass has been in jail three years now based upon this evidence. At every opportunity in post-conviction Motions and briefs since discovering beyond any doubt that the evidence was false Bass has asked the same question. Although omitted from the Opposition, the closest the State ever came to acknowledging this was in its Answer directed by Nevada Supreme Court's Order of November 24th, 2010 relating to whether Appellant's conviction was based on false evidence. Therein the State submitted:

> "Bass points to selected language in the prosecutor's opening statement and closing argument and argues that the State presented false evidence. However, Bass fails to recognize that the jury was instructed that argument by counsel is not evidence and their decision must be based only on the facts and evidence presented during the trial.
>
> (AA Vol.X p.2092)

> Therefore, even if the prosecutor made one statement about how the Allscripts prescription bottle tied into Gina Micali's death, it is presumed the jury followed this instruction and based their decision only on the evidence."
>
> (A-57)

This novel argument that the State can represent or misrepresent whatever it wants and the effect of which is cured by a jury instruction was understandably abandoned in Respondent's Opposition. It is, however, illustrative of the lengths they might go to in an effort to preserve the conviction.

Finally, the Respondent's Opposition completely ignores the Court's instruction to the jury on the murder count which deserves repeating:

> "INSTRUCTION NO. 5
>
> In order to find the Defendant Guilty of Second Degree Murder (Sale of a Controlled Substance Causing Death), the State must prove each of the following elements beyond a reasonable doubt:
>
> 1.That on or about October 4-6, 2005, in Clark County, Nevada;
>
> 2. The Defendant unlawfully:
>
> 3. Killed a human being;
>
> 4. The death was proximately caused by a controlled substance;
>
> 5. The controlled substance was sold, given, traded or otherwise made available to the victim by the defendant;
>
> 3. In violation of Nevada Revised Chapter 453."
>
> (Emphasis added) (X-2075).

Although this instruction is disjointed, vague, and of poor syntax, it is clear that October 4th-6th must mean something and therefore apply to all purported elements.

The State now suggests that it didn't need the false evidence since the controlled substance could have been provided on some other date. This is not what the witnesses, exhibits, prosecutor, and judge submitted to the jury. Amanda Burney's false or erroneous identification was confirmed by her Medication Receipt, State's Exhibit 16 (VI-1323 & 1324).

There can be absolutely no question but that the judge and jury were misled to believe that the half-full (missing 51 pills) bottle of hydrocodone which Amanda Burney identified as being provided to Gina Micali on October 4th, 2005 was the cause of death. This was the bottle she destroyed after flushing the contents down the toilet.

The conviction was based upon the introduction and argument of false evidence. *Hanley v. State*, 85 Nev. 615, 617, 460 P.2d 162 (1969) addresses the prosecutor's standard of fairness within a due process context:

"1. Due process forbids the state from deliberately misrepresenting the truth, and a conviction that rests in part upon such false evidence must be set aside. *Miller v. Pate, supra*. Equally offensive is an instruction by the prosecutor to his witness to withhold significant evidence favorable to the accused. When that evidence is not revealed, the conviction cannot stand. *Alcorta v. Texas*, supra. If the state knows that its witness has testified falsely on a point relevant to the credibility of that witness, and fails to correct that falsehood, the conviction is constitutionally infirm. *Napue v. Illinois, Supra*."

Napue v. Illinois, 360 U.S. 264 (1959) and *Alcorta v. Texas*, 355 U.S. 28 (1957) were among the federal authorities cited in *Hanley*.

CONCLUSION

The Court should grant Bass' Petition for Writ of Certiorari. The Constitutional violations are all established and compelling. This has resulted in the destruction of Dr. Bass' medical career and his present incarceration.

Respectfully Submitted

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